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IN THE

Supreme Court of the United States

October Term, 1983

THE STATE OF NEW YORK; and JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent,

and

BEECHCRAFT EAST, INC.,

Respondent.

JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

against

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Should a federal court in a preliminary injunction proceeding consider a state forum's availability to provide an adequate remedy at law?

2. Does a private party, seeking a federal preliminary injunction against a state or its officer and alleging only nominal money loss, suffer irreparable injury because the Eleventh Amendment bars recovery of this damage if he ultimately prevails?

Parties

The caption includes the names of the parties in the court that issued the judgment sought to be reviewed with one exception. James L. Larocca, as Commissioner of the Department of Transportation of the State of New York, has been substituted for William Hennessey, sued in the same capacity, a defendant-appellant below. Former Commissioner Hennessey resigned his office on December 13, 1982. Commissioner Larocca was appointed as Acting Commissioner on March 10, 1983 and confirmed as Commissioner by the New York State Senate on April 26, 1983.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions and Orders

The May 26, 1983 opinion of the United States Court of Appeals for the Second Circuit, affirming the denial by the United States District Court for the Northern District of New York of petitioners' motion to vacate an October 1, 1982 preliminary injunction in favor of respondent Beechcraft East, Inc., is reported at 708 F.2d 92. It is reproduced as Appendix A to this petition.

The district court entered a November 29, 1982 written order without opinion, denying petitioners' motion to vacate the October 1 preliminary injunction. The November 29 order is not reported and is reproduced as Appendix B to this petition. An October 14, 1982 district court memorandum decision and order in support of the October 1 preliminary injunction is reported at 552 F. Supp. 255. It is reproduced as Appendix C to this petition. An October 7, 1982 district court order, confirming the October 1 preliminary injunction, is not reported. It is reproduced as Appendix D to this petition. The October 1 preliminary injunction, restraining a New York statute prohibiting nighttime flight operations at State-owned Republic Airport, was issued orally by the district court and is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was filed on May 26, 1983. It is reproduced as Appendix E to this petition. The order of the court of appeals, denying petitioners' petition for rehearing and suggestion for rehearing *in banc*, was filed on July 21, 1983. It is reproduced as Appendix F to this petition.

This Court has jurisdiction to review the May 26, 1983 judgment by writ of certiorari under 28 U.S.C. § 1254(1) (1948). Petitioners suggest that the Court dispose of this case by summary reversal of the court of appeals' judgment.

Statute Involved

The questions presented ask whether the federal courts, in ruling on preliminary injunction motions, should consider the remedies available in state courts and whether the Eleventh Amendment, precluding movants from obtaining money damages in the federal courts, eases the injunction standard by permitting movants to demonstrate irreparable harm with a showing limited to alleged nominal money loss. The preliminary injunction from which these questions arise restrained the continued implementation of Section 402(3) of the New York Transportation Law. 61A McKinney's Consolidated Laws, N.Y. TRANSP. LAW §§ 400, *et seq.* (Supp. 1982-1983). The Section prohibits flight operations at Republic Airport from 11:00 p.m. to 7:00 a.m. daily except in case of emergency, and became effective on September 19, 1982. It is included in Article 15 of the Transportation Law entitled "Air Transportation Facilities And Services At Stewart and Republic Airports". Article 15 was enacted by L. 1982, ch. 370, § 1, and is reproduced as Appendix G.

Statement of the Case

A. Proceedings in the District Court.

Respondent the United States of America, on behalf of the Federal Aviation Administration, commenced this action against New York and the Commissioner of its Department of Transportation in the United States District Court for the Northern District of New York on September 17, 1982. The United States' complaint alleged, *inter alia*, that the statutory nighttime curfew at State-owned Republic Airport ("Republic") breached certain federal grant agreements and violated the Supremacy Clause and the Impairment of Contract Clause of the United States Consti-

tution. A declaratory judgment and a permanent injunction against the curfew were sought. On September 22, respondent Beechcraft East, Inc. ("Beechcraft"), a fixed based operator providing support services for Republic's users, moved to intervene. Beechcraft alleged essentially the same claims as the United States.* On September 24, the third respondent, the Aircraft Owners and Pilots Association, also alleging claims similar to those of the United States, commenced a separate action which was later consolidated with this action. Only Beechcraft moved for preliminary injunctive relief, and its motion was heard before the district court on October 1, 1982.

In support of its preliminary injunction motion, Beechcraft relied on two brief affidavits, one from its attorney, which generally described its legal position, and the other from its General Manager, Allen K. Pepin, which consisted largely of conclusory allegations and speculation. According to Mr. Pepin, Beechcraft would suffer irreparable injury if the nighttime curfew were not enjoined because its customers based at Republic might leave for other airports. Affidavit of Allen K. Pepin, sworn to on September 20, 1982 ("Pepin Aff."), at 2, ¶ 4 and 3-4, ¶ 7. Mr. Pepin sought to demonstrate the intentions of Beechcraft's customers by twenty-five customer letters annexed to his affidavit. The United States submitted a memorandum of law in support of Beechcraft's likelihood of success on the merits but declined to address Beechcraft's alleged harm, stating that it was "not in a position to know of, and therefore, comment upon Beechcraft's factual allegations of possible irrepa-

* Beechcraft's complaint incorporated the entirety of the United States' complaint by reference. *See* Complaint In Support of Motion of Beechcraft East, Inc. For Leave To Intervene at 2, ¶ 2. It also appeared to plead a contract cause of action, distinct from the United States, based on a License Agreement, dated October 1, 1982, between it and Republic's prior owner, the Metropolitan Transportation Authority (the "MTA"). *Id.* at 3, ¶ 8.

rable injury.'"* Plaintiff's Response To Motion Of Beechcraft East, Inc. To Intervene And For A Preliminary Injunction at 2.

The State challenged Beechcraft's allegations of irreparable injury as legally insufficient since they consisted entirely of minimal money loss. For example, the State showed that Beechcraft's primary function of servicing Republic's users would not be affected since only 2.6 percent of Republic's flight operations occurred during the nighttime hours of the curfew. Affidavit of Clarence Cook, sworn to on September 30, 1982, at 17, ¶ 27. The State also argued that the statements of Beechcraft's General Manager about the loss of customers were not probative since they were based upon twenty-five equivocal and unreliable letters. *Id.* at 18, ¶ 29. *See* Defendants' Memorandum of Law In Opposition To The Proposed Intervenor's Motion For A Preliminary Injunction at 40 & n.*.

On October 1, 1982, the district court awarded Beechcraft a preliminary injunction, finding that "Beechcraft has suffered irreparable injury, and the plaintiffs, now Beechcraft and the United States [sic] have a likelihood of success on the merits. . . ." Transcript of the Proceedings on October 1, 1982 at 23. In support of the finding of irreparable injury, the court, relying on the customer letters, first said that Beechcraft's alleged loss was " 'not remote or speculative, but [is] actual and imminent' ". App. C at 22a.**

* The United States' memorandum did not address Beechcraft's claims under federal grant agreements for Republic's development between the United States and the MTA. On appeal, the United States conceded that Beechcraft was not a third-party beneficiary of the agreements. Brief of Plaintiff-Appellee United States of America at 30. *See Santa Monica Airport Ass'n.* v. *City of Santa Monica*, 481 F. Supp. 927, 946 (C.D. Calif. 1976), *aff'd*, 659 F.2d 100 (9th Cir. 1981) and *National Aviation* v. *City of Hayward*, 418 F. Supp. 417, 419 (N.D. Calif. 1976).

** References preceded by "App." identify the lettered appendix and page(s) of the appendices to this petition.

Then, citing the Eleventh Amendment's foreclosure of Beechcraft's recovery of damages (*id.*), the district court said that Beechcraft did not have an adequate remedy at law and that "therefore, the fact that the loss may be only a small percentage of [its] nationwide and international revenue is irrelevant." *Id.*

Given that nominal money loss traditionally is insufficient to support a finding of irreparable injury and that the district court's description of the amount of damage it believed Beechcraft would suffer was equivocal, the State examined Mr. Pepin by deposition to ascertain the dimension of Beechcraft's loss. The State learned that Beechcraft had a total of 200-230 customers who parked their planes at Beechcraft's facilities and who used Beechcraft's services. Transcript of Deposition of Allen K. Pepin, dated October 25, 1982 ("Pepin Tr."), at 2B. The business from these customers, which Beechcraft claimed it would lose without an injunction, had accounted for a maximum of $300,000 of the $21 million of sales revenue realized by Beechcraft in 1981, its last fiscal year for which complete data then was available.* *Id.* at 28 and 10A. Indeed, the $300,000 figure —approximately one percent of the total $21 million of sales revenue—overstated the potential injury which Beechcraft allegedly had demonstrated to the court on its preliminary injunction motion. As Beechcraft then allegedly had shown and as the court had found, Beechcraft might lose some customers if the nighttime curfew were not enjoined, not lose all. Pepin Aff. at 3-4, ¶ 7.

* Mr. Pepin testified that Beechcraft, whose ultimate parent is the Raytheon Company (Pepin Tr. at 14-17), has a diversified business at Republic. It is a franchisee of Beech Aircraft-Raytheon (*id.* at 19) and sells airplanes manufactured by this company. *Id.* at 18. This portion of its business accounted, by far, for the largest percentage of its revenues in 1981—roughly $16 million. *Id.* at 30. As a fixed based operator, Beechcraft maintains a "line service" (*id.* at 13), leasing plane parking space to aircraft users (*id.* at 34) and selling fuel and oil to these customers as well as transient users. *Id.* at 27. Beechcraft also maintains full service, parts and avionics departments (*id.* at 21) and charters aircraft. *Id.* at 26.

With this further proof of Beechcraft's nominal money loss, the State moved to vacate the preliminary injunction, contending that Beechcraft's alleged damage could not constitute irreparable harm. The State additionally argued that the district court had overlooked the availability of the State Court of Claims as a tribunal in which Beechcraft could seek recovery of its alleged damages.* The court denied the motion and limited its remarks to a finding that the State Court of Claims did not have jurisdiction to entertain a Beechcraft action at law and that the alleged unavailability of this state forum made the extent of Beechcraft's damage irrelevant. Transcript of the Proceedings on November 19, 1982 at 18. The State then appealed the denial of its vacatur motion.

B. The Decision of the Court of Appeals.

The court of appeals (*Oakes, Cardamone* and *Winter*, JJ.) affirmed the denials of petitioners' motion to vacate, holding that "Beechcraft's injury was irreparable even though Beechcraft's losses were only pecuniary because a suit in federal court against New York to recover the dam-

* In Section 8 of the New York Court of Claims Act, the State waives its sovereign immunity in accordance with the limitations of Section 9(2) of the Act. Section 9(2) permits claims against the State for breach of contract, appropriation of property and the commission of torts. Both sections are codified in 29A (Part 2) McKinney's Consolidated Laws, N.Y. JUDICIARY LAW §§ 8 and 9 (Supp. 1981-1982). The State argued below that the enactment of the curfew was a proprietary act over which the Court of Claims had jurisdiction either as an alleged breach of Beechcraft's License Agreement or as an alleged *de facto* appropriation of property. *See Automated Ticket Systems, Ltd.* v. *Quinn*, 70 App. Div. 2d 726, 416 N.Y.S. 2d 864 (3d Dept. 1979), *aff'd as modified*, 49 N.Y. 2d 792, 426 N.Y.S. 2d 731, 403 N.E. 2d 451 (1980); and *Keystone Associates* v. *New York*, 39 App. Div. 2d 176, 333 N.Y.S. 2d 27 (3d Dept. 1972), *aff'd on opinion below*, 33 N.Y. 2d 848, 352 N.Y.S. 2d 194 (1973). The district court accepted that "the enactment of the curfew was an act of a proprietor" (App. C at 27a) in its October 14 memorandum decision and order, but later held that the State Court of Claims did not have jurisdiction over this proprietary act on the vacatur motion. (App. B at 8a).

ages sustained by Beechcraft would be barred by the Eleventh Amendment." App. A at 3a. Two grounds were advanced in support of its irreparable injury holding.

The court of appeals first cited a "well-established rule" that "in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available *federal* legal remedies" (Emphasis original), relief foreclosed to Beechcraft by the Eleventh Amendment. *Id.* at 4a. In support of the purported general rule, the court relied on *Petroleum Exploration, Inc.* v. *Commissioner*, 304 U.S. 209, 220-221 (1938), holding that plaintiff's alleged injury was not irreparable regardless of the absence of a remedy at law in a state forum, and *DiGiovanni* v. *Camden Insurance Ass'n.*, 296 U.S. 64, 69-70 (1935), holding that plaintiff's inability to satisfy the jurisdictional amount then required to maintain an action at law in the federal court did not cause it to have an inadequate remedy. *Id.* It also relied upon two statutes, the Tax Injunction Act, 28 U.S.C. § 1341 (1948) and the Johnson Act, 28 U.S.C. § 1342 (1948), both requiring federal courts to deny equitable relief if state court remedies are "plain, speedy and efficient", which it regarded as illustrative of "narrow and specific" legislative exceptions of the "well-established rule". *Id.* Consonant with the restrictions it imposed on the federal courts to limit their inquiries to available federal remedies, the court considered the legal remedies available to Beechcraft in the State Court of Claims to be irrelevant and did not reach the district court's finding that the Court of Claims would not have jurisdiction.

Turning to its second Eleventh Amendment ground, the court of appeals held that Beechcraft suffered "absolute" irreparable injury because "Beechcraft's federal damages against New York are constitutionally foreclosed". *Id.* The State's argument that a new and less restrictive ir-

reparable injury standard would be established if Beechcraft were permitted to obtain its injunction against the State or its officer by recourse to the Eleventh Amendment rather than by demonstrating its actual irreparable loss was characterized as depriving federal courts of their equity power any time the Eleventh Amendment bar is present. *Id.* The court then rejected the argument it attributed to the State as inconsistent with *Ex Parte Young*, 209 U.S. 123 (1908), and *Quern* v. *Jordan*, 440 U.S. 332 (1979), both holding that prospective injunctions may be entered against state officers who act under an unconstitutional statute. *Id.* at 5a. The court also dismissed the State's argument, based on *Edelman* v. *Jordan*, 415 U.S. 651 (1974), that an injunction standard, allowing irreparable injury and inadequacy of the remedy at law to rest exclusively on the Eleventh Amendment, is tantamount to a coerced waiver of immunity subjecting states to money actions in federal court. *Id.* The court concluded that the injunction here did not violate the *Edelman* holding because it did not impose compensatory damage costs against the State or its officer. *Id.*

Reasons for Granting the Writ

Fundamental rules of equity and principles of federalism and comity always have compelled federal courts to consider the adequacy of state remedies and to require proof of both irreparable injury and inadequacy of the remedy at law when they consider the award of a preliminary injunction. Refusing to inspect available state remedies and invoking the Eleventh Amendment as the source of both inadequacy of the remedy at law and irreparable injury, the court of appeals allowed Beechcraft a preliminary injunction against New York and its Commissioner of Transportation to which it is not entitled given the nominal money loss it claimed. If left undisturbed and not reviewed now, the decision below instructs the federal courts to

ignore the existence of state tribunals and to merge adequacy of the remedy at law and irreparable injury whenever sovereign immunity restricts the recovery of claimed damages. The decision thus creates a new irreparable injury test which coerces federal and state governments to waive their sovereign immunity to avoid adverse injunction orders. The errors of the court below in this regard are manifest, and its judgment may be summarily reversed without plenary consideration.

A. The Court Of Appeals' Holding That Federal Courts May Not Inspect The Adequacy Of State Court Remedies Is Inconsistent With Principles of Federalism Which This Court Has Recognized Since Its Earliest Days.

It is basic principle of American equity practice, developed under Section 16 of the Judiciary Act of 1789, 1 Stat. 82, that federal courts are precluded from exercising their equity power when a state tribunal provides a "plain, adequate and complete" remedy. *Mathews* v. *Rodgers*, 284 U.S. 521, 525 (1932). Section 16 was intended "to protect the states from the encroachments which would result from the exercise of equity powers by Federal courts failing to observe it."* *Atlas Life Ins. Co.* v. *Southern, Inc.*, 306 U.S. 563, 569 (1939). This Court recently confirmed the principle as stating an "obvious precept". *Fair Assessment In Real Estate Ass'n.* v. *McNary*, 454 U.S. 100, 116 & n.8 (1981). The decision below opposes this fundamental principle by misreading two decisions of this Court and two federal statutes. It also fails to observe the Second Circuit's earlier holding in *Potwora* v. *Dillon*, 386 F.2d 74 (2d Cir.

* The Section was perpetuated without material change in Section 267 of the Judicial Code, 36 Stat. 1163 (1911), 28 U.S.C. § 384 (1935). While Section 267 was repealed in 1948 as obsolete in view of the merger of law and equity accomplished by the Federal Rules of Civil Procedure, 62 Stat. 992, "its principle remains intact." *Oneida Indian Nation* v. *County of Oneida*, 464 F.2d 916, 922 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 661 (1974).

1967), a point raised on the petition for rehearing in this case. In *Potwora*, Judge Friendly considered and rejected "[p]laintiff's blanket position as to the irrelevancy of state court remedies", *id.* at 77, and proceeded to inquire whether state law there provided an adequate remedy. *See Coalition of Michigan Nursing Homes* v. *Dempsey*, 537 F. Supp. 451, 464 (E.D. Mich. 1982) (holding that plaintiffs challenging Michigan's Medicaid reimbursement scheme had an adequate remedy in Michigan's Court of Claims).

The court of appeals' case law error is apparently attributable to its misunderstanding of a sentence of *dictum* in *DiGiovanni*, 296 U.S. at 69, repeated in *Petroleum Exploration*, 304 U.S. at 217 & n.8, which describes the duty of federal courts to identify the nature of an available state remedy according to federal, not state, standards. This sentence, "[t]he inadequacy prerequisite to relief in a Federal court of equity is measured by the character of remedy afforded in Federal rather than in state courts of law", *id.*, is simply a restatement of an essential concept of federal jurisdiction. *Smyth* v. *Ames*, 169 U.S. 466 (1898). *See* 1 POMEROY'S EQUITY JURISPRUDENCE § 293, at 654 (5th ed. 1941). The concept requires federal courts not to give effect to state law which, by its unique characterization of a remedy, diminishes a federal court's equity power. Instead, a federal court must make its own determination as to whether the state remedy claimed to be available is legal or equitable in its nature. *Stratton* v. *St. Louis Southwestern Railway Co.*, 284 U.S. 530, 534 (1932). The purpose for the concept is twofold—to prevent states from restricting federal court jurisdiction, *Payne* v. *Hook*, 74 U.S. (7 Wall.) 425 (1868), and to preserve a litigant's constitutional entitlement to a jury trial. *Scott* v *Neely*, 140 U.S. 106, 110 (1891). *See, Oneida Indian*, 464 F.2d at 921. The concept has no bearing whatsoever on a federal court's obligation to inspect state remedies.

The court of appeals' erroneous articulation of the "well-established" rule as one precluding inspection of

state remedies caused it to view the Tax Injunction Act, 28 U.S.C. § 1341 (1948), and the Johnson Act, 28 U.S.C. § 1342 (1948), which require federal courts to defer to state remedies when they are "plain, speedy and efficient," as "specific and narrow" exceptions. App. A at 4a. Contrary to the court's reading, these statutes are not exceptions at all. Instead, they refine the correct rule advanced by the State which requires federal courts to inspect state remedies, and they have their "roots in equity practice [and] in principles of federalism. . . ." *Tully* v. *Griffin*, 429 U.S. 68, 73 (1976). They were enacted to restrict further a federal court's exercise of its traditional equity power. *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 522, 526-527 (1981). Indeed, if the court were correct in its view of those statutes, this Court's instruction that equity cases, decided under Section 16 of the Judiciary Act, may be authoritative in determining whether a state remedy meets the statutory standard of "plain, speedy and efficient", *id.* at 515 & n. 33, could not be followed.

As appears, the decision below undermines the scheme of federalism by denigrating the role of coordinate state courts. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943); *Massachusetts State Grange* v. *Benton*, 272 U.S. 525, 527 (1926) (*Holmes*, J.); *cf. Younger* v. *Harris*, 401 U.S. 37, 44-45 (1971). States are deprived of their sovereign prerogative to create judicial tribunals for the purpose of entertaining actions at law against them and to expect that the courts of the federal government will respect the existence of these tribunals. *See Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); and *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). Further, the court of appeals' decision invites the choice of federal courts as favored forums. As a result of the holding below, litigants will obtain federal equitable relief on the theory that they are without adequate remedies at law when the state courts in fact provide them with these remedies.

B. The Court Of Appeals Erred In Holding That The Existence Of A Jurisdictional Bar Creates An Inadequate Remedy.

The court of appeals held that Beechcraft had an inadequate remedy at law "because the Eleventh Amendment precludes Beechcraft from suing New York in federal court for any damages [it] suffers." App. A at 3a. This holding is inconsistent with *DiGiovanni*, 296 U.S. at 64, the principal case the court cites for its erroneous holding that federal courts may only look at available federal remedies.

In *DiGiovanni*, the plaintiff insurance company argued, and the court of appeals there held, that it was entitled to equitable relief because it could not meet the federal jurisdictional amount required for it to maintain an action at law in federal district court. *Id.* at 67-68. This Court reversed and held that the insurance company did not have an inadequate remedy merely because it could not meet the requisite federal jurisdictional amount, *id.* at 69-70:

> [W]ant of jurisdictional amount in controversy which deprives a federal court of its authority to act is not ground for invoking its equity powers. The statute [Section 267 of the Judicial Code] forbids resort to equity in the federal courts when they afford adequate legal relief. It does not purport to command that equitable relief shall be given in every case in which they fail to do so. Plainly it does not so command when the want of legal remedy is due to the express prohibitions of Congress. . . .

As a result, the insurance company was left to its legal remedies in state court. *Cf. White* v. *Sparkill Realty Corp.*, 280 U.S. 500, 512 (1930) (dismissing suit in equity and refusing to transfer to law side because no federal question jurisdiction present). To have held otherwise would have improperly "extend[ed] the normal equity jurisdiction of the federal courts. . . ." 49 HARV. L. REV. 950, 951 (1936) (note

on *DiGiovanni*). *Accord,* 14 TEX L. REV. 554, 555 (1935-1936) (note on *DiGiovanni*).

The Eleventh Amendment yields the same result in the case at bar. *McCauley* v. *Kellogg,* 15 F. Cas. 1261, 1263 (C.C. La. 1874) (Eleventh Amendment not causing movant's remedy in federal court to be inadequate). The court of appeals does not discuss the *DiGiovanni* holding or articulate any reason why *DiGiovanni* was not controlling. As it disregards its own earlier holding in *Potwora, supra,* the court now fails to observe its earlier decision in *Oneida Indian, supra,* where *DiGiovanni* was correctly applied. Judge Friendly there stated that "adequacy of the legal remedy is tested by what a federal court could afford if it had jurisdiction, not by what it could do in the particular case." 464 F.2d at 922. In sum, both *DiGiovanni* and *Oneida Indian* required the court below to rule in the State's favor.

C. The Court Of Appeals Erred In Creating A New Standard Of Irreparable Injury For Litigation In Which Sovereign Immunity Bars Relief At Law.

To obtain a preliminary injunction, a movant must demonstrate both "irreparable harm and inadequacy of legal remedies". *Beacon Theaters* v. *Westover,* 359 U.S. 500, 506-507 (1959). "Absence of [a] legal remedy does not dispense with the necessity" of showing irreparable injury. *Atlas Life Ins. Co.,* 306 U.S. at 570. *Petroleum Exploration,* 304 U.S. at 209, cited by the court of appeals as supportive of its holding that federal courts may only look at available federal remedies, highlights this rule. This Court there held that the movant was not entitled to an injunction regardless of the inadequacy of the state remedy because its irrecoverable expense "is not the sort of irreparable injury against which equity protects." [footnote deleted] *Id.* at 221.

The court of appeals ignores the rule and wrongly equates the purported inadequacy of the legal remedy with irreparable injury. Under its decision, the loss of even one dollar establishes irreparable injury if the Eleventh Amendment bars the recovery of that amount of money damage. The court's error also will extend to litigation involving the United States as a defendant, a sovereign having its own immunity against the award of money damages in federal district court. *See, e.g., Hurley* v. *Kincaid,* 285 U.S. 95, 104 (1932); *Graham* v. *Schweiker,* 545 F. Supp. 625, 627-628 (S.D. Fla. 1982) (both holding that plaintiffs had an adequate remedy in the United States Court of Claims even though principles of federal sovereign immunity precluded recovery at law in federal district court); and *Phillips* v. *Marsh,* 687 F.2d 620 (2d Cir. 1982) (denying injunction to West Point cadet because she could recover money damages, presumably in the United States Court of Claims). The decision below does not so burden non-governmental defendants since they may rely upon the doctrine that money damage is not irreparable injury. *Sampson* v. *Murray,* 415 U.S. 61 (1974). *See, e.g., Sperry Int'l. Trade* v. *Israel,* 670 F.2d 8, 12 (2d Cir. 1982). Thus, a new irreparable injury standard, a crucial part of the injunction test, is created in litigation involving sovereign immune governments with a movant merely needing to allege minimal financial loss to satisfy the standard.

The court of appeals' decision mischaracterizes the State's Eleventh Amendment argument on this point. The State did not raise the Eleventh Amendment because it denied, as the court suggests, that a prospective injunction can issue against a state officer where the traditional injunction standard, including irreparable injury, is met. *Ex Parte Young,* 209 U.S. at 129, decided the question, and the State so recognized. Instead, the State, citing *Edelman,* 415 U.S. at 651, raised the Eleventh Amendment to show that the court of appeals' affirmance of the injunction solely

on the basis of the Eleventh Amendment improperly leaves the State with only one choice to avoid the harshness of an injunction—to waive its constitutional immunity and thereby subject itself to money judgments in the federal court. Ignoring this result, the decision below produces exactly the "open-ended" and "potentially burdensome" state obligation which this Court advised would pose "serious questions under the Eleventh Amendment." *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 29-30 (1981).

There is a present need for the Court to review the decision below. The decision requires federal courts to apply a new erroneous irreparable injury standard on preliminary injunction motions against the state and federal governments, matters which are litigated constantly in the federal courts. While the State may have a later opportunity to vindicate its position on the merits, mootness will foreclose the claims presented in this petition. If the petition is not now granted, the decision below thus will evade review and the protection sovereign immunity extends to state and federal governments will continue in jeopardy.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the court of appeals summarily reversed.

Dated: New York, New York
October 19, 1983

Respectfully submitted,

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APPENDICES

APPENDIX A

May 26, 1983 Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1049—August Term, 1982

(Argued March 21, 1983 Decided May 26, 1983)

Docket No. 82-6343

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

BEECHCRAFT EAST, INC.,

Intervenor-Plaintiff-Appellee,

v.

THE STATE OF NEW YORK; and WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,

Defendants-Appellants.

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Plaintiff-Appellee,

v.

WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,

Defendants-Appellants.

May 26, 1983 Opinion of the Court of Appeals

Before:

OAKES, CARDAMONE, and WINTER,
Circuit Judges.

Appeal from grant of preliminary injunction by United States District Court for the Northern District of New York, Roger J. Miner, *Judge*. Appellants' argument that a federal court must consider the availability of state court remedies in finding whether movant would suffer irreparable injury without preliminary injunction is rejected and the grant of preliminary injunction is affirmed. Appellants' motion to exclude the United States and the Aircraft Owners and Pilots Association from this appeal is denied.

BARRIE L. GOLDSTEIN, Assistant Attorney General (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman, Deputy Solicitor General, Judith A. Gordon, Assistant Attorney General, of counsel), *for Appellants.*

JAMES J. VON OISTE, Port Jefferson, NY, *for Intervenor-Plaintiff-Appellee Beechcraft East, Inc.*

R. JOHN SIEBERT, Department of Justice, Civil Division (Kenneth N. Weinstein, United States Department of Transportation, Leonard A. Ceruzzi, Richard W. Danforth, Robert F. Eisengrein, Federal Aviation Administration, J. Paul McGrath, Assistant Attorney General, David J. Anderson, Eugene A. Beatty, Department of Justice, Civil Division, of counsel), *for Plaintiff-Appellee United States of America.*

JOHN S. YODICE, Bethesda, MD (Charles J. Peters, Bethesda, MD, Mark L. Heller, of counsel), *for Plaintiff-Appellee Aircraft Owners and Pilots Association.*

May 26, 1983 Opinion of the Court of Appeals

PER CURIAM:

This appeal is taken from an order of the United States District Court for the Northern District of New York, Roger J. Miner, Judge, enjoining the State of New York from imposing a nighttime ban on the use of Republic Airport in Suffolk County, New York. The court below granted plaintiff Beechcraft's motion for preliminary injunction on grounds that New York's curfew was overbroad and arbitrary in violation of the Supremacy Clause of the United States Constitution, and on the ground that Beechcraft would suffer irreparable business damages because the Eleventh Amendment precludes Beechcraft from suing New York in federal court for any damages Beechcraft suffers. We agree.

To be entitled to a preliminary injunction under the test established in *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979) (per curiam), Beechcraft must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief." *Id.* at 72.

New York does not challenge Judge Miner's judgment on Beechcraft's likely success on the merits; this appeal contests only the finding of irreparable harm. Judge Miner found that Beechcraft's injury was irreparable even though Beechcraft's losses were only pecuniary because a suit in federal court against New York to recover the damages sustained by Beechcraft would be barred by the Eleventh Amendment. New York argues that the court

below erred because Beechcraft could have sued New York in the New York Court of Claims. New York's argument, however, simply misses the mark; in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available *federal* legal remedies. *See Petroleum Exploration, Inc. v. Commissioner*, 304 U.S. 209, 217 & n.8 (1938); *DjGiovanni v. Camden Insurance Association*, 296 U.S. 64, 69 (1935). Legislative exceptions to this well-established rule are narrow and specific. *See, e.g.*, 28 U.S.C. § 1342 (Johnson Act, depriving federal district courts of power to enjoin state regulation of public utilities where, inter alia, there is a "plain, speedy and efficient remedy" in state court); 28 U.S.C. § 1341 (Tax Injunction Act, depriving federal courts of power to enjoin the assessment, levy, or collection of any tax under state law when a "plain, speedy and efficient" remedy is available in state court).

New York's arguments against what it calls the "novel proposition" that only federal remedies should have been considered by the court below are answered by a look at the logic of the lower court's decision and at the later fate of the cases on which New York relies. The State argues that the court below eased the necessary showing of irreparable harm in cases seeking injunctive relief against states when in fact the court can only be said to have required an absolute showing of irreparability here because Beechcraft's federal damages against New York are constitutionally foreclosed. New York's insistence that *In re Ayers*, 123 U.S. 443 (1887), deprives the federal courts of the equitable power to enjoin state officials whenever federal

courts lack the legal authority to award damages against them overlooks the Supreme Court's subsequent decision in *Ex Parte Young*, 209 U.S. 123 (1908), which specifically empowered federal courts to enjoin state officials from enforcing allegedly unconstitutional statutes. This holding "undermined the basis of *In re Ayers*." Bator, Mishkin, Shapiro & Wechsler, Hart & Wechsler's Federal Courts and the Federal System 935 (2d Ed. 1973). New York complains that this view is inconsistent with the Eleventh Amendment protection afforded to states by *Edelman v. Jordan*, 415 U.S. 651 (1974), which invalidates injunctions that impose costs on states that must be regarded as compensatory damages. But the State's argument fails to show how the lower court's injunction will impose such forbidden costs on it; the argument fails as well to acknowledge the Court's decision in the second *Jordan* case, *Quern v. Jordan*, 440 U. S. 332 (1979), which stresses that the federal courts *do* have the power to issue prospective, injunctive relief against state officers who act pursuant to an unconstitutional statute. *Id.* at 346-47. The court below issued just such relief and nothing more. The grant of a preliminary injunction is affirmed.

New York has separately moved that the United States and the Aircraft Owners and Pilots Association (AOPA) be denied participation in this appeal. New York argues that the United States should be forbidden to participate in this appeal because the State and the United States had agreed that the United States would not seek a preliminary injunction in this case if New York would not turn off the nighttime lighting and navigational equipment at Re-

public Airport. The parties disagree entirely as to whether this bargain was ever struck. *Compare* Goldstein Affidavit 10 *with* Seibert Affidavit 5, 7. There is no need for us to resolve this conflict, however, because the terms of the alleged agreement would only prevent the United States from seeking injunctive relief. Beechcraft sought the injunctive relief and the United States is before us in opposition to a motion to *vacate* such relief and not in support of a motion to grant it.

New York also argues that the United States and AOPA should be forbidden to participate because "[s]tanding to appeal requires that a party be aggrieved by a lower court order." But this test need only be applied to New York because the State is apealing the lower court order. Even if this substantial interest test was applicable to appellants [sic], the appellants [sic] here would pass it: the United States seeks to protect its constitutional and statutory supremacy and AOPA has alleged substantial economic injury akin to Beechcraft's. A test that would not include these parties would exclude New York as well. New York's motion is denied.

APPENDIX B

November 29, 1982 Order of the District Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

82 Civ. 993 (R.J.M.)

UNITED STATES OF AMERICA,

Plaintiff,

and

BEECHCRAFT EAST, INC.,

Intervenor-Plaintiff,

against

THE STATE OF NEW YORK; and WILLIAM HENNESSY, as Commissioner of the Department of Transportation of the State of New York,

Defendants.

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82 Civ. 1023 (R.J.M.)

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Plaintiff,

against

WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,

Defendant.

The defendants having moved for an Order to vacate this Court's Order of preliminary injunction dated October

7, 1982, or, alternatively setting down a date to conduct an evidentiary hearing, and said motion having regularly come on to be heard on the 19th day of November 1982,

Now, upon reading and filing the notice of motion herein dated November 4, 1982, with proof of due service thereon, the affidavit of Barrie L. Goldstein, Esq., sworn to the 4th day of November 1982, and on the papers submitted upon the motion for the Order, all in support of this motion, and the affidavit of Allen K. Pepin, sworn to the 12th day of November 1982, and on the papers submitted in opposition thereto, and after hearing Barrie L. Goldstein, Esq., attorney for defendants, in support thereof and James J. von Oiste, Esq., attorney for intervenor-plaintiff, BEECHCRAFT EAST, INC., in opposition thereto, and the Court finding that intervenor-plaintiff, BEECHCRAFT EAST, INC., lacks an adequate remedy at law for damages against the defendants in the Court of Claims of the State of New York,

Now, on motion of James J. von Oiste, Esq., attorney for intervenor-plaintiff, BEECHCRAFT EAST, INC., it is

ORDERED, that defendants' motion to vacate this Court's Order of preliminary injunction dated October 7, 1982, or, alternatively setting down a date to conduct an evidentiary hearing is denied.

Dated: November 29, 1982
Albany, New York

/s/ ROGER J. MINER

United States District Judge

APPENDIX C

October 14, 1982 Memorandum Decision and Order of the District Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

82-CV-993

UNITED STATES OF AMERICA and BEECHCRAFT EAST, INC.,
Plaintiffs,

against

THE STATE OF NEW YORK and WILLIAM HENNESSEY, As Commissioner of the Department of Transportation of the State of New York,

Defendants.

Appearances:

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October 14, 1982 Memorandum Decision and Order of the District Court

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ROGER J. MINER, D.J.

I

In this action plaintiffs, the United States and Beechcraft East, Inc., seek a judgment declaring unconstitutional the statute originally introduced as New York Senate Bill No. 9450-A (S. 9450-A), entitled "AN ACT to amend the transportation law, in relation to air transportation facilities and services at Stewart and Republic airports and making appropriations therefor." Plaintiffs also seek to permanently enjoin defendants, the State of New York and William Hennessey, as Commissioner of the Department of Transportation of the State of New York, from imposing a curfew or turning off runway lights, navigation aids, and landing and take-off aids at Republic Airport, East Farm-

ingdale, New York. The complaint is predicated upon the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.*, the Noise Control Act of 1972, as amended, 49 U.S.C. § 1431, and the Airport and Airway Development Act of 1970, 49 U.S.C. § 1701 *et seq.*, as well as the Contract Clause of the United States Constitution, U.S. Const. Art I, § 10, and the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl. 2.[1] Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1337 and 1345. Before this Court is plaintiff Beechcraft East, Inc.'s application for a preliminary injunction. Fed. R. Civ. P. 65(a).

II

Republic Airport, located in Suffolk County, Long Island, is a general aviation airport known as a "reliever airport." In this capacity, Republic relieves New York's major commercial airports, John F. Kennedy International Airport, LaGuardia, and Newark, of general (non-commercial) aircraft. It is one of only four airports in the New York City metropolitan area whose primary function is as a reliever airport, capable of accommodating all aircraft types, around the clock, in all weather conditions.[2] In addi-

1. Beechcraft East, Inc.'s motion to intervene in this action pursuant to Fed. R. Civ. P. 24(a) was granted by this Court on October 7, 1982. Beechcraft, in addition to the claims listed above, alleges violation of the Commerce Clause, U.S. Const. Art. I § 8, cl. 3. All of Beechcraft's claims are apparently based upon 42 U.S.C. § 1983. *National Aviation* v. *City of Hayward*, 418 F. Supp. 417, 429 (N.D. Cal. 1976). Jurisdiction is pursuant to 28 U.S.C. §§ 1331 and 1337.

2. The other three reliever airports for general aviation include Teterboro Airport, Teterboro, New Jersey, Morristown Airport, Morristown, New Jersey and the Westchester County Airport, near White Plains, New York.

tion to the importance of Republic Airport as a reliever airport, the Federal Aviation Administration ("FAA"), Eastern Region, bases its aircraft at the airport because of ready availability on short notice.

The Metropolitan Transit Authority ("MTA") is a public benefit corporation created by special act of the New York State Legislature. N.Y. Public Authorities Law § 1260 *et seq.* It has the power to enter into contracts, § 1256(6), and to acquire and hold real property, § 1265(7). The MTA is independent and is not governed by the supervisory powers of the New York State Department of Transportation, § 1268(8). The MTA may be sued, § 1265(1), and held liable in tort for money damages, § 1276.

The MTA was given the authority by the State of New York to own and operate airports in 1965. In 1967, the State authorized, pursuant to the Transportation Capital Facilities Bond Act, the creation of a state debt in the amount of $250,000,000 for the purpose of the acquisition, reconstruction and improvement of airports in the State by public benefit corporations, including the MTA. In March, 1969, the State, by the Transportation Department, for the use of the MTA, purchased 296 acres from the Farmingdale Company for the enlargement of Republic.[3] During the 1970s the State, for the MTA, acquired an additional 144 acres from private owners.

3. Republic Airport originally consisted of about 100 acres and began its life as an airfield used by various aircraft related firms in 1928. In 1965 the airport was open to the public for the first time. Today, Republic is comprised of 535 acres and has two hard-surfaced runways.

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On May 6, 1971, pursuant to the authority of 49 U.S.C. § 1115, the United States conveyed approximately 97 acres to the MTA, thus completing the Republic Airport site. The MTA, in exchange for the conveyance of Republic Airport property, expressly covenanted in the deed of conveyance:

> That all facilities of the Airport developed with Federal Aid and all those useable for landing and taking off of aircraft will be available to the United States at all times, without charge, for use by aircraft of any Agency of the United States in common with other aircraft. . . .

Deed, ¶ 8 (covenant 8). MTA also promised in the deed that "any subsequent transfer of property interests conveyed hereby will be made subject to all of the covenants, conditions and limitations contained in the instrument." Deed, ¶ 5 (covenant 5).

During the past eleven years of MTA's ownership of Republic Airport, the United States, through the Federal Aviation Administration, has made nine grant awards to MTA for acquiring and improving the facilities at Republic. These awards totaled $6,820,782. The improvements have included, *inter alia*, the installation of navigational equipment, runway lighting, improvement of runway markings, and construction of drainage and fencing.

Among the covenants included in the grant agreements are the following:

> (1) . . . not [to] dispose of or encumber its title or other interests of the site and facilities during the

period of federal interest or while the Government holds bonds, whichever is longer. (Assurance No. 10; Affidavit of Clarence Cook, Ex. H);

(2) The sponsor [MTA] will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, unless by such transaction the obligation to perform all such covenants is assumed by another public agency found by the FAA to be eligible under the Act and Regulations to assume such obligations and having the power, authority, and financial resources to carry out all such obligations. (Assurance No. 32; Affidavit of Clarence Cook, Ex. H);

(3) The Sponsor [MTA] will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport *open to all types,* kinds, and classes of aeronautical use on fair and reasonable terms without discrimination between such types, kinds, and classes. Provided; That the Sponsor may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport; And Provided Further, That the Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public. (Assurance No. 18; Affidavit of Clarence Cook, Ex. H) [emphasis added];

(4) The Sponsor [MTA] will operate and maintain in a safe and serviceable condition the Airport and all

facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes: Provided, That nothing contained herein shall be construed to require that the Airport be operated for aeronautical uses during temporary periods when snow, flood, or other climatic conditions interfere with such operation and maintenance; And Provided Further, That nothing herein shall be construed as requiring the maintenance, repair, restoration or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstances beyond the control of the Sponsor. *In furtherance of this covenant the Sponsor will have in effect at all times arrangements for:*

a. Operating the airport's aeronautical facilities whenever required.

b. Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions, and

c. Promptly notifying airmen of any condition affecting aeronautical use of the Airport. (Assurance No. 22, Affidavit of Clarence Cook, Ex. H) [emphasis added];

(5) All facilities of the Airport developed with Federal aid and all those usable for the landing and taking off of aircraft, *will be available to the United States at all times, without charge, for use by government aircraft in common with other aircraft....* (As-

surance No. 26, Affidavit of Clarence Cook, Ex. H) [emphasis added].

In addition to these general covenants, MTA expressly agreed in the second of the nine grant agreements to operate the lighting systems funded by the grant "throughout each night of the year." (Project No. 8-36-0028-02, Government's Ex. 4).

On June 21, 1982, New York Governor Hugh L. Carey signed into law a bill amending the State's Transportation Law by adding Article 15.[4] The Article's central feature is the transfer from the MTA to the New York Department of Transportation of "all rights, title and interest in all assets, equipment and property . . . used in connection with the ownership, planning, development, maintenance and operation of . . . Republic airport. . . ." Section 400(3)(h). The Commissioner of the Department of Transportation is given the authority to operate Republic and, if he determines it to be "necessary, convenient or desirable", Section 400(3)(b), to enter into a service contract for such operations with the MTA or any other qualified operator, Section 400(3)(h). Until the Commissioner entered into such a contract, the Legislature provided that the MTA, although no longer Republic's owner, should continue to operate the airport for a transitional period not to exceed one year from the effective date of the Article. Section 400(3)(h).

Section 402(1) created the Republic Airport Commission, a citizens' advisory council, to advise the Commissioner. Finally, Article 15, in recognition of noise complaints by

4. Senate Bill S. 9450-A.

inhabitants who live in Republic's vicinity, included a provision, Section 402(3),[5] which imposed a mandatory 11:00 P.M. to 7:00 A.M. curfew at the airport.[6]

5. Section 402(3) provides:

> The arrival or departure of aircraft to or from the airport between the hours of 11 P.M. and 7 A.M., except in the case of emergency, and the development of additional runways at the airport are hereby prohibited, provided, however, that such prohibitions may be altered, modified or changed by resolution adopted by a majority vote of the members of the commission after giving public notice of such alteration, modification or change and holding a public hearing thereon. Any alteration, modification or change which affects the prohibition with respect to arrival and departure of aircraft shall be made only after due consideration has been given to the pe[r]iod of daylight occurring at such airport. Notwithstanding the foregoing provisions of this subdivision, the prohibition against the arrival or departure of aircraft to or from the airport between the hours of 11 P.M. and 7 A.M. shall not become effective until ninety days [September 19, 1982] after the effective date of this subdivision.

6. Defendants allege that Bill S. 9450-A, now Article 15 of the Transportation Law, was eventually passed for three reasons. First, after MTA became Republic's owner in 1969, it experienced substantial operating deficits (for example, $1.4 million in 1979, $2.1 million in 1980, $2.3 million in 1981 and an expected $3.7 million in 1982). Second, the MTA, due to its primary mass transportation function, was unable to devote sufficient time to Republic's operation. Third, Republic's facilities were expected to grow and the Department of Transportation was regarded as a more suitable state agency to foster economic development. (Affidavit of Clarence Cook, ¶ 16). The stated purpose of Article 15 corresponds with the above:

> § 400. Air transportation facilities and services at Stewart and Republic airports. 1. In order to meet present and future state needs with respect to the provision of adequate, safe and efficient air transportation facilities and services to the public, and to promote the economic development and well-being of the state, the planning, development, maintenance and operation of such facilities and services at Stewart and Republic airports may be carried out by the department and the commissioner in accordance with the provisions of this article.

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The Government alleges that, contrary to the deed and grant covenants, neither the MTA nor the State of New York, at any time, obtained the FAA's permission to transfer ownership of the airport from MTA to the State Department of Transportation or to deny Republic's use to the United States or to other aeronautical users between 11:00 P.M. and 7:00 A.M.[7] The Government further alleges that New York's decision to turn off runway lights and navigational aids and to declare Republic closed during curfew hours presents serious safety hazards to those using the airport for emergency night time landings, to those intending to land before 11:00 P.M. but delayed for adverse weather conditions or other reasons, and to those intending to use the lighted airport as a navigational aid while going to or from nearby LaGuardia and JFK airports. However, at a September 15, 1982 meeting between counsels of the FAA and the State, defendants agreed not to turn off runway lighting and navigational aids pending litigation of the issues in this case, in exchange for the Government's promise not to seek a preliminary injunction. Notwithstanding defendants' concession on the issue of lighting and navigational aids, defendants declined to rescind transfer of the airport or imposition of the curfew. As a result, the Government filed the instant action seeking injunctive and declaratory relief.

Beechcraft East, Inc. ("Beechcraft") is a Kansas corporation organized and existing under the laws of the State

7. Defendants allege that they indeed obtained FAA approval, but, at the last moment, the FAA refused to formally acquiesce in the transfer. In any event, the curfew provisions of the legislation went into effect September 20, 1982.

of Kansas and maintains its principal office at Republic Airport, East Farmingdale, New York. On October 1, 1972, Beechcraft and MTA entered into an agreement whereby MTA leased to Beechcraft certain land and facilities at Republic for the purpose of conducting a general aviation facility to provide, among other things, all aviation related services as well as the sale, purchase, rental and lease of aircraft. As a result of that agreement, Beechcraft has expended sums of money in the development of its general aviation facility, purchased properties and equipment necessary to perform its obligations pursuant to the agreement, and has entered into agreements with owners and lessees of aircraft, based at Republic Airport, wherein Beechcraft has agreed to provide twenty-four hour service and flights on demand, as well as cargo transfer and emergency medical flights.

Beechcraft alleges that, as a result of the curfew imposed by the defendants, many of Beechcraft's contract customers gave Beechcraft notice of their intention to relocate to other airports if a curfew is in fact imposed. Beechcraft maintains, moreover, "that as a consequence of the curfew imposed by New York Senate Bill No. 9450-A, Beechcraft East, Inc.'s business has been seriously injured and the very life and continued existence of its business has been put in jeopardy." (Complaint, In Support of Motion for Leave to Intervene, ¶ 13).

October 14, 1982 Memorandum Decision and Order of the District Court

III

In this Court a party seeking a preliminary injunction must make a clear showing of "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Sperry International Trade, Inc.* v. *Government of Israel,* 670 F.2d 8, 11 (2d Cir. 1982); *Warner Bros., Inc.* v. *Gay Toys, Inc.,* 658 F.2d 76, 78-79 (2d Cir. 1981). A preliminary injunction is an "extraordinary and drastic remedy which should not be routinely granted" except upon a clear showing that the movant has carried its heavy burden. *Buffalo Forge Co.* v. *Ampco-Pittsburgh Corp.,* 638 F.2d 568, 569 (2d Cir. 1981); *Beech-Nut, Inc.* v. *Warner Lambert Co.,* 480 F.2d 801, 803 (2d Cir. 1973). Moreover, where granting a preliminary injunction would adversely affect the "public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Yakus* v. *United States,* 321 U.S. 414, 440 (1944); *New York Pathological and X-Ray Laboratories, Inc.* v. *Immigration and Naturalization Service,* 523 F.2d 79, 81 (2d Cir. 1975). This Court believes that plaintiff Beechcraft's application for a preliminary injunction should be granted since Beechcraft has met the burden of demonstrating both prongs of this Circuit's preliminary injunction test.

October 14, 1982 Memorandum Decision and Order of the District Court

IV

A. Irreparable Harm

Beechcraft has demonstrated that, as a result of the curfew, its customers are cancelling their agreements with Beechcraft and are "going elsewhere". In this regard, Beechcraft has presented evidence that over twenty-five[8] customers have given Beechcraft notice of their intention to relocate to another airport when the curfew is imposed, and, moreover, that cancellations continue to be received by Beechcraft on an almost daily basis.

Defendants allege that, on an average basis, Republic Airport during 1981 had a total of 527 daily takeoffs and landings and only 14 of these operations—2.6 percent—occurred during the hours of 11:00 P.M. and 7:00 A.M. Therefore, since Beechcraft's business at Republic is to service aircraft using the facility, defendants contend, on the basis of the above statistics, "Beechcraft cannot claim that its viability as a business entity will be irreparably harmed if it is unable to realize revenues from its servicing of the few aircraft which will now be unable to use Republic

8. These customers now include Doubleday Communications Corporation, Aero Direct, Inc.; the New York Islanders; Nassau Flyers, Inc.; Pegasus Aeroservices Inc.; Vanguard Instrument Corporation; Oscar de la Renta, Division of Rich Fin. Inc.; Price-Driscoll Corporation; AOPA New York Members; Assemblyman G. Oliver Koppell; Struthers Electronics Corporation; Action Crane Corp.; Irwin & U.S.; Imperial Jalousie Corp.; Comsteel Products, Inc.; Associated Marketing Systems, Inc.; Mercury Paint Corp.; Aping Specialties Corp.; Precise Optics/PME, Inc., Procyon Corp.; Damin; Compac; Botie Instrument Co., Inc.; AFA, Inc.; and Advantage Food Marketing Corp.

during the hours of the curfew." (Affidavit of Clarence Cook, ¶ 28).

However, defendants have not consulted the appropriate navigational aids supplied by the Second Circuit. That Court recognized, in *Jackson Dairy, Inc.* v. *H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam), that "[a]s to the kind of irreparable harm that the party must show, the language of some past cases has suggested to some a spectrum ranging from possible to probable which is defined as 'not remote or speculative but . . . actual and imminent.' " Yet it is clear that the preferred showing to be made must be beyond "possible irreparable injury" since, "as the great Voltaire once wrote in *Candide*, his most entertaining and perhaps most influential philosophical novel . . . anything is possible in this best of all possible worlds." *Jack Kahn Music Co., Inc.* v. *Baldwin Piano & Organ Company*, 604 F.2d 755, 759 (2d Cir. 1979).

Here, Beechcraft has demonstrated a business loss that is certainly "not remote or speculative, but [is] actual and imminent". *Id.* Over twenty-five customers have given notice that they will terminate their accounts with Beechcraft, and others have in fact transferred their business to other airports. For this loss there is no adequate remedy at law,[9] and, therefore, the fact that the loss may be only a small percentage of Beechcraft's nation-wide and international revenue is irrelevant. There is no requirement in this Circuit that a party wait until near-extinction before

9. The eleventh amendment, of course, precludes Beechcraft from obtaining compensatory damages here. *See, e.g., Edelman* v. *Jordan*, 415 U.S. 651 (1974).

moving for a preliminary injunction. The law, like the Constitution, is not a suicide pact.[10]

B. Likelihood of Success on the Merits

Beechcraft contends that the action of the State of New York in imposing a night time curfew at Republic Airport impairs its contract rights in violation of the Contract Clause of the Constitution, Article I, § 10 and impedes interstate commerce in derogation of the Commerce Clause, Article I, § 8, cl. 3. In the alternative, Beechcraft contends that New York's actions violate the Supremacy Clause of the Constitution, Article VI, cl. 2 since, (1) the transfer of the airport and the imposition of a curfew conflicts with federal interests in airport development and aviation safety, and (2) the imposition of a curfew on all aircraft users by a state under its police power authority is otherwise pre-empted by congressional legislation.

As a threshold matter, this Court observes that it is a cardinal principle of American jurisprudence that, given the existence of both constitutional and statutory issues in an action, "[t]he latter ... [is] to be decided first and the former not reached if the statutory claim ... [is] dispositive." *Hagans* v. *Lavine*, 415 U.S. 528, 543 (1974). *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582 n. 22 (1976); *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Moreover, there is no question that a claim under the Supremacy Clause is considered a statutory issue to be determined before resolution of any constitutional question. *Hagans* v. *Lavine, supra,*

10. To paraphrase Justice Jackson.

415 U.S. at 549; *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965).

Whether a federal statute pre-empts the otherwise lawful authority of a state to regulate in a specific area is a question of congressional intent. "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Therefore, if Congress expressly declares that the authority conferred by it shall be singularly federal, the States may not exercise concomitant or supplementary power over the identical activity. *Campbell* v. *Hussey*, 368 U.S. 297 (1961); *Rice* v. *Santa Fe Elevator Corp., supra.* Even when Congress has failed to speak expressly to the issue of federal exclusivity, an intention to create sole federal authority can be implied. *Fidelity Federal Savings & Loan Assoc.* v. *Reginald D. de la Cuesta*, —— U.S. ——, 102 S. Ct. 3014 (1982). Key factors in this determination include: (1) the pervasiveness of the federal regulation, *Rice* v. *Santa Fe Elevator Corp., supra;* (2) dominance of the federal interest in the field of regulation, and whether non-federal regulation obstructs the full execution of those aims, *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971).

Beechcraft contends that the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.*, as it amends the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, and the regulations promulgated thereunder, pre-empt the area of noise regulation and render Article 15 unconstitutional. The leading case on this question is unquestionably *City of Burbank* v.

Lockheed Air Terminal, 411 U.S. 624 (1973). *Burbank* involved a city ordinance which imposed a "curfew" that, in the absence of an emergency, prevented jet aircraft from taking off from privately owned Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M. Justice Douglas, writing for a 5-4 majority, after a detailed examination and analysis of the aforementioned statutes, their legislative history, and the interplay of the preemption rationale of *Rice* v. *Santa Fe Elevator Corporation*, *supra*, concluded that the "pervasive nature of the scheme of federal regulation of aircraft noise" constituted preemption. *City of Burbank* v. *Lockheed Air Terminal*, *supra*, 411 U.S. at 633.

However, *Burbank* recognized that Congress singled out airport proprietors and gave them special, although undefined, leeway in controlling the sources of aircraft noise directly. *City of Burbank* v. *Lockheed Air Terminal*, *supra*, 411 U.S. at 635-36 n. 14; *British Airways Board* v. *Port Authority of New York* [*I*], 558 F.2d 75, 83 (2d Cir. 1977).[11] The rationale for this exception is clear: since airport proprietors bear liability for excessive aircraft noise under *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), fairness dictates that they must have power to insulate themselves from that liability. *British Airways Board* v. *Port Authority of New York* [*I*], *supra*, 558 F.2d at 83. *See* 34 Fed. Reg. 18, 355 (1969); S. Rep. No. 1353, 90th Cong., 2d Sess. 7

11. There were two Circuit decisions concerning the British Airways Board and the Port Authority: *British Airways Board* v. *Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977) and *British Airways* v. *Port Authority of New York*, 564 F.2d 1002 (2d Cir. 1977).

(1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 2688, 2693. However, before a political entity, acting as an airport proprietor, may possess the power to abate airport noise, it must bear the responsibility, either actual or potential, for excessive airport noise. Among the bases given in *Griggs* for constitutional liability, or proprietorship for *Burbank* purposes, were the entity's ability to obtain the necessary approach easements, *see British Airways Board* v. *Port Authority of New York* [*II*], 564 F.2d 1002, 1011 (2d Cir. 1977), and its status as promoter, lessor, and operator of the airport. *Griggs* v. *Allegheny County, supra,* 369 U.S. at 89. *See Town of East Haven* v. *Eastern Airlines, Inc.,* 331 F. Supp. 16, 30-32 (D. Conn. 1971). Indeed, several other courts have expressly recognized that municipalities and other political sub-divisions of a state may fall under the so-called *Griggs* exception. *See, e.g., National Aviation* v. *City of Hayward, Cal.,* 418 F. Supp. 417 (N.D. Cal. 1976); *Air Transport Association of America* v. *Crotti,* 389 F. Supp. 58 (N.D. Cal. 1975).

Beechcraft, however, argues that New York was acting under its police power when Article 15 was enacted and not as an airport proprietor, and, therefore, the curfew provisions are a nullity under the *Burbank* rationale. As previously noted, the rationale for the proprietor exemption to imposing curfews is to enable a proprietor to protect himself from liability for excess aircraft noise. Beechcraft contends that, at the time at which the curfew was imposed, New York had never been the proprietor of Republic and had not experienced a prior and continuing commercial interest in avoiding liability. The threat of commercial ruin

from large, adversary monetary judgments underlying the "fairness" rationale for the proprietor exemption was not present when New York took over the airport, it is contended, and New York's action was a purely political act of its Legislature.[12] Therefore, Beechcraft concludes, the *Griggs* exception does not apply to a state or at least to the state acting at bar. *Cf. San Diego Unified Port District* v. *Gianturco*, 651 F.2d 1306 (9th Cir. 1981) (where the court held that California was not acting as an airport proprietor when its transportation department promulgated curfew hours).

This Court rejects this contention. It is well accepted that a state may act in both a proprietary and a governmental capacity. *United Transportation Union* v. *Long Island Rail Road Co.*, —— U.S. ——, No. 80-1295 (U.S. March 24, 1982); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *United States* v. *California*, 297 U.S. 175 (1936). Here, the State of New York, simultaneously with the transfer of ownership of Republic from MTA to the State, promulgated the curfew in response to local community complaints of noise pollution stemming from Republic. Although the transfer may have been for political and economic reasons and pursuant to legitimate state police power, the enactment of the curfew was an act of a proprietor. By statute, New York has waived its immunity from liability and action and has consented to suit in accordance with the same rules of law as apply to actions in the state Supreme Court against individuals or corporations. N.Y. Court of Claims Act. Therefore, since the State here faces potential liability, the rationale of the *Griggs* exception applies.

12. *See* n. 6, and accompanying text, *supra*.

However, the Second Circuit in *British Airways Board I* held that the scope of an airport proprietor's power "to impose use restrictions based on noise considerations is defined by the limited role Congress reserved for it in the national scheme. . . ." 558 F.2d at 84. The proper bailiwick of the proprietor is the "issu[ance of regulations] or establish[ment of requirements] as to the permissible level of noise which can be created by aircraft using the airport." S. Rep. No. 1353, *supra* at 6, *reprinted in* [1968] U.S. Code Cong. & Admin. News 2694. The State then is vested "only with the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs. Any other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster." *British Airways Board I, supra*, 558 F.2d at 84. *See also National Aviation* v. *City of Hayward, Cal., supra.*

Here, the Court finds that Article 15's curfew is overbroad, unreasonable and arbitrary. The curfew extends to *all* aircraft, regardless of the *degree* of accompanying emitted noise. In fact, Article 15 makes no reference to noise levels measured in decibels as a factor in particular plane prohibition during the 11:00 P.M. to 7:00 A.M. curfew. Instead, all take-offs and landings are proscribed, except emergency flights, and all aircraft are presumed and deemed intolerable, as a matter of law, to the surrounding communities. Moreover, as the State admits, only 14 flights occur during the forbidden hours—a mere 2.6 percent of the total daily aircraft traffic. A total proscription of flights during the curfew period, it seems to this Court, is unrea-

sonable in view of the sparsity of flights during the curfew hours. Therefore, since the curfew imposed by Article 15 at Republic extends to all aircraft, regardless of decibel level emitted by individual aircraft, and is in any event arbitrary under the circumstances of the low number of flights, the curfew provision of Article 15 is overbroad and constitutionally impermissible in view of federal pre-emption of regulations concerning noise and planes in flight. *British Airways Board, I, supra. See Allegheny Airlines* v. *Village of Cedarhurst,* 238 F.2d 812 (2d Cir. 1956); *see also American Airlines* v. *Town of Hempstead,* 398 F.2d 361 (2d Cir. 1968), *cert. denied,* 393 U.S. 1017 (1969).

In addition, the Supremacy Clause covers not only cases where federal regulation has so pervasively pre-empted an area so as to prohibit state action of a similar character, but also where narrower conflicts between state and federal law exist, even when the subject of the conflict involves an area not otherwise pre-empted by federal regulation. "Even where Congress has not completely displaced state regulation in a specified area, state law is nullified to the extent that it actually conflicts with federal law." *Fidelity Federal Savings & Loan Assoc.* v. *Reginald de la Cuesta, supra,* 102 S. Ct. at 3022. *Gibbons* v. *Odgen,* 9 Wheat 1 [6 L.Ed. 23] (1824). In deciding whether a statute is in conflict with a federal statute or regulation, and ergo invalid, a court must first ascertain the construction of the federal and state statutes and regulations, and then decide the constitutional question of whether they conflict. *Perez* v. *Campbell, supra,* 402 U.S. at 644 (1971).

Here, the federal grant law requires that airports receiving federal funding be made available for use by the

United States at all hours. Federal grants to airport operators are made pursuant to the Airport and Airways Development Act of 1970, 49 U.S.C. § 1701 *et seq.* Among the Act's provisions is a requirement that, as a condition to obtaining federal funding, an airport owner must give assurances, as the MTA (and now New York as MTA's successor in interest) here so covenanted, that "all of the facilities of the airport developed with federal financial assistance and all those usable for landing and takeoff will be available to the United States . . . in common with other aircraft *at all times.*" (emphasis added). 49 U.S.C. § 1718(5). New York's blanket 11:00 P.M. to 7:00 A.M. curfew undeniably conflicts with the congressional mandate that Republic Airport, as a recipient of federal grant money, be open for use by the United States, and private parties, twenty-four hours a day. It is clear then that Article 15's curfew provision, since it conflicts with a federal statute and the will of Congress, is repugnant to the Constitution, and, therefore, a nullity.

V

Accordingly, Beechcraft has sustained its burden with respect to this application. A preliminary injunction order was signed on October 7, 1982.

The foregoing shall constitute the Court's Findings of Fact and Conclusions of Law in support of the order heretofore made, pursuant to Fed. R. Civ. P. 52(a).

It is so Ordered.

Dated: October 14, 1982
Albany, New York

/s/ Roger J. Miner

U.S. District Judge

APPENDIX D

October 7, 1982 Order of the District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

Present:

HON. ROGER J. MINER,
Judge

Civil Action No. 82-CV-933

UNITED STATES OF AMERICA,

Plaintiff,

against

THE STATE OF NEW YORK and WILLIAM HENNESY, as Commissioner of the Department of Transportation of the State of New York,

Defendants.

BEECHCRAFT EAST, INC.,

Plaintiff, Intervenor,

against

THE STATE OF NEW YORK and WILLIAM HENNESY, as Commissioner of the Department of Transportation of the State of New York,

Defendants.

A motion having duly come on to be heard before this Court on October 1, 1982, upon an Order to Show Cause

granted herein by Hon. Roger J. Miner, one of the Judges of this Court, on September 22, 1982 for an Order pursuant to Rule 65(a), Federal Rules of Civil Procedure, enjoining and restraining defendants and anyone acting in concert with them, pending the trial and determination of this action, from imposing a curfew or turning off runway lights, navigation aids and landing and take-off aids at Republic Airport, East Farmingdale, New York, and after reading and filing the said Order to Show Cause, the Complaint of Beechcraft East, Inc., verified September 20, 1982, and the affidavits of James J. von Oiste, Esq., Allen K. Pepin and Alfred T. McDonough sworn to on September 21, 1982, Septemeber [sic] 20, 1982 and September 24, 1982, respectively, with proof of due service thereof, in support of said motion, and the affidavit of Clarence Cook, sworn to on September 28, 1982 in opposition thereto, and having heard the arguments of counsel in open court:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants and anyone acting in concert with them, are hereby enjoined and restrained, pending the trial and determination of this action, from imposing a curfew or turning off runway lights, navigation aids and landing and take-off aids at Republic Airport, East Farmingdale, New York.

Signed this 7th day of October 1982 at Albany, New York.

Enter:

/s/ ROGER J. MINER

ROGER J. MINER
Judge, United States District Court

APPENDIX E

May 26, 1983 Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of May[,] one thousand nine hundred and eighty-three.

Present:

HON: JAMES L. OAKES
HON: RICHARD J CARDAMONE
HON: RALPH K. WINTER
Circuit Judges,

82-6343

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

BEECHCRAFT EAST, INC.,
Intervenor-Plaintiff-Appellee,

v.

THE STATE OF NEW YORK; et al.,
Defendants-Appellants.

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,
Plaintiff-Appellee,

v.

WILLIAM HENNESSY, et ano.,
Defendants-Appellants.

May 26, 1983 Judgment of the Court of Appeals

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

FURTHER ORDERED that appellants' motion to exclude the United States of America and the Aircraft Owners and Pilots Association from participation in this appeal be and it hereby is denied.

A. Daniel Fusaro,
Clerk

by: /s/ EDWARD J. GUARDARO
Edward J. Guardaro,
Deputy Clerk

APPENDIX F

July 21, 1983 Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of July, one thousand nine hundred and eighty-three.

No. 82-6343

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

BEECHCRAFT EAST, INC.,
Intervenor-Plaintiff-Appellee,

v.

THE STATE OF NEW YORK, and WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,
Defendants-Appellants.

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,
Plaintiff-Appellee,

v.

WILLIAM HENNESSEY, As Commissioner of the Dept. of Transportation of the State of New York,
Defendants-Appellants.

July 21, 1983 Order of the Court of Appeals

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, William Hennessey, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro,
Clerk

by: /s/ VICTORIA C. DALTON
Deputy Clerk

APPENDIX G

Article 15 of the State Transportation Law

STATE OF NEW YORK

S. 9450—A
Cal. No. 867

A. 12404—A

SENATE—ASSEMBLY

April 27, 1982

IN SENATE—Introduced by Sens. SCHERMERHORN, JOHNSON, LEVY, MARCHI, WINIKOW—read twice and ordered printed, and when printed to be committed to the Committee on Transportation—reported favorably from said committee and committed to the Committee on Finance—reported favorably from said committee with amendments, ordered to a third reading and to be reprinted as amended, retaining its place in the order of third reading

IN ASSEMBLY—Introduced by COMMITTEE ON RULES—(at request of M. of A. Yevoli, Healey, Halpin, Rettaliata)—read once and referred to the Committee on Corporations, Authorities and Commissions—committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the transportation law, in relation to air transportation facilities and services at Stewart and Republic airports and making appropriations therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The transportation law is amended by adding a new article fifteen to read as follows:

Article 15 of the State Transportation Law

ARTICLE 15

Air Transportation Facilities and Services at Stewart and Republic Airports

Section 400. Air transportation facilities and services at Stewart and Republic airports.
401. Stewart airport commission.
402. Republic airport commission.

§ 400. Air transportation facilities and services at Stewart and Republic airports. 1. In order to meet present and future state needs with respect to the provision of adequate, safe and efficient air transportation facilities and services to the public, and to promote the economic development and well-being of the state, the planning, development, maintenance and operation of such facilities and services at Stewart and Republic airports may be carried out by the department and the commissioner in accordance with the provisions of this article.

2. The following terms, as used in this article shall mean:

(a) "Air transportation facilities" shall mean aircraft and developments such as airports, air terminals, runways, hangars, control towers, ramps, taxiways, aprons, wharves, bulkheads, buildings, structures, equipment, parking areas, improvements, facilities and any real property necessary, convenient or desirable for or relating to the landing, taking off, accommodation and servicing of aircraft, or for the loading, unloading, interchange or transfer of passengers, baggage or cargo, or otherwise for the accommodation,

use or convenience of passengers, carriers, crews and employees. It shall also mean facilities providing access to airports or air terminals, including highways, access roads, driveways and appurtenances, devices and structures incidental thereto.

(b) "Air transportation purposes" shall mean the effectuation, establishment, acquisition, construction, rehabilitation, improvement, maintenance, extension, or operation of air transportation facilities or services owned, leased, operated or provided by the department, or by others pursuant to agreement with the department, at Stewart and/or Republic airports.

(c) "Department" shall mean the department of transportation of the state of New York.

(d) "Commissioner" shall mean the commissioner of transportation of the state of New York.

(e) "Stewart and Republic airports" shall mean those airports, and facilities and surrounding areas under the jurisdiction of the metropolitan transportation authority or any subsidiary public benefit corporation, located at (in the case of Stewart airport) the county of Orange, towns of Newburgh and New Windsor; and (in the case of Republic airport) in the county of Suffolk, town of Babylon.

(f) "Real property" shall mean lands, structures, franchises and interests in land, including air space, air rights, waters, lands under water and riparian rights, and any and all things and rights included within said term, and includes not only fee simple absolute but also any and all lesser interests, including but not limited to easements, rights of

way, uses, leases, licenses and all other incorporeal hereditaments and every estate, interest or right, legal or equitable, including terms for years and liens thereon by way of judgments, mortgages or otherwise.

(g) "Aircraft" shall mean aircraft of all types, including but not limited to airplanes, airships, dirigibles, helicopters, gliders, seaplanes, or any other contrivance now or hereafter used for the navigation of or flight in air or space.

(h) "Stewart airport commission" shall mean the commission established by section four hundred one of this article.

(i) "Republic airport commission" shall mean the commission established by section four hundred two of this article.

3. In order to effectuate the purposes of this article:

(a) The commissioner, for and on behalf of the people of the state of New York, may acquire any and all air transportation facilities necessary for air transportation purposes, pursuant to the eminent demain procedure law, or by purchase, gift, grant, transfer, assignment, contract, lease or other arrangement.

(b) The department may, on such terms and conditions as the commissioner determines necessary, convenient or desirable, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair air transportation facilities at Stewart and Republic airports, or may provide therefor by contract, lease or otherwise, with any person,

firm, corporation, municipality, or governmental unit, agency or instrumentality. In connection with the operation of any such air terminal, the department may establish, construct, effectuate, operate, renovate, maintain, improve, extend or repair, or may provide therefor by contract, lease or otherwise, any related services or activities the commissioner deems necessary, convenient or desirable.

(c) The department may establish, levy and collect or cause to be established, levied and collected, or join with others in the establishment, levying and collection, of such fares, tolls, rentals, rates, charges and other fees as the commissioner deems necessary, convenient or desirable for the use or operation of any air transportation facilities, services, equipment or activities operated at, serving or incidental to Stewart or Republic airports.

(d) The commissioner may establish such rules, regulations and procedures governing the use, operation and occupancy of air transportation facilities and related facilities, equipment, services and activities at, serving or incidental to Stewart and Republic airports as he may deem necessary, convenient or desirable.

(e) The department may apply for, accept, receive and utilize grants of property, money and services and other assistance offered or made available to it by any person, government or agency or instrumentality thereof for any use within the scope of its functions, powers, duties or responsibilities under this article.

(f) The department may do all things it deems necessary, convenient or desirable to manage, control and direct

the maintenance and operation of air transportation facilities and related facilities, equipment, activities and services, at Stewart and/or Republic airports; provided, however, that the department shall take no action which would be inconsistent with or supersede the provisions of subdivision three of section four hundred two of this article.

(g) The department may conduct or participate in demonstration projects relating to air transportation facilities and services at, serving or incidental to Stewart or Republic airports.

(h) Upon the effective date of this article all rights, title and interest in all assets, equipment and property, both tangible and intangible, used in connection with the ownership, planning, development, maintenance and operation of Stewart and Republic airports of the metropolitan transportation authority and/or any subsidiary corporation of such authority are hereby transferred to the department of transportation. Any and all appropriations or reappropriations made in any capital projects fund or state purposes account to the metropolitan transportation authority in connection with either Stewart and/or Republic airports which remain unencumbered on the effective date of this article are hereby transferred to the department of transportation. The commissioner, subject to the approval of the division of the budget, shall enter into an agreement or agreements with the metropolitan transportation authority and/or any subsidiary corporation of such authority and authorization is hereby granted to the metropolitan transportation authority and/or any subsidiary corporation of such authority to enter into such agreement or agreements to transfer and

assign to the department of transportation any other rights and obligations and contract rights and obligations resulting from or arising out of the ownership, planning, development, maintenance and/or operation of Stewart and/or Republic airports, and notwithstanding the provisions of chapter four hundred seventy-two of the laws of nineteen hundred seventy-one, the metropolitan transportation authority and/or any subsidiary corporation of such authority is authorized to contract with the commissioner to provide service as an airport operator for Stewart and/or Republic airports. In lieu of contracting with the metropolitan transportation authority and/or any subsidiary corporation of such authority for such services, the commissioner may contract for the operation of Stewart and/or Republic airports with any qualified operator. Any service contract shall contain the clause that the term of such contract with respect to either Stewart airport or Republic airport or both shall be subject to cancellation upon six months' notice from the commissioner. Such notice shall be given only after the consultation, guidance, advice and assistance relative to such action by either the Stewart airport commission or the Republic airport commission or both with respect to such service contract as it affects either Stewart airport or Republic airport or both respectively. Until the effective date of any such contract between the metropolitan transportation authority and/or subsidiary corporation of such authority or another entity and the commissioner to provide airport operator services at Stewart and/or Republic airports respectively, the metropolitan transportation authority through its subsidiary metropolitan airports authority

shall continue to provide the service as an airport operator for both Stewart and Republic airports with the costs and expenses of such activities throughout the period of the effective date of this article through the effective date of such contract being the obligation of the metropolitan transportation authority, but not longer than one year from the effective date of this article.

Notwithstanding anything to the contrary contained in this paragraph on or after the effective date of this article, interests in the real property and air transportation facilities at Stewart airport hereinafter set forth shall be leased by the state to the United States government upon terms and consideration and for a term to be mutually agreed upon by the commissioner and said United States government with the concurrence of the chief of staff to the governor for the purpose of establishing an air national guard facility:

(i) For such temporary period or periods as the chief of staff to the governor deems necessary, and for the purposes of an interim air national guard facility, pending construction of a permanent facility—

Building 110, building 112 (Hangar I), building 122 (Hangar E) with adjacent aircraft parking ramp, building 138, building 404, building 502, building 700 with adjacent area for vehicle parking, building 702 with adjacent area for vehicle parking, building 704 with adjacent area for vehicle parking, building 706 with adjacent area for parking, building 2290—Four Bays, building 2306 with adjacent vehicle parking compound. The federal government has appropriated five hundred thousand dollars for rehabilitation

of the said interim air national guard facility. Upon relocation of the air national guard to said permanent facilities all improvements constructed by the federal government shall become the property of the state of New York.

(ii) For a term of fifty years with option for renewal for the purposes of a permanent air national guard facility—

Building 105 with adjacent parking compound located in rear of building, and the land commonly known as the "pad area" situated between runways twenty-seven and thirty-four and the eastern boundary of the airport property, this site being the location upon which a permanent air national guard facility will be constructed.

(i) In connection with any improvements on real property or any new leases or renewal of leases for real property made after the department assumes jurisdiction over an air transportation facility, whether owned by the state or others, that are devoted to non-aviation purposes in whole or substantial portion thereof, the commissioner shall enter into agreements to pay, or make provisions for the payment of, annual sums in lieu of taxes to any municipality or political subdivision of the state in which such improvements are located. Such non-aviation purposes shall include but not be limited to motel, hotel, restaurant, transportation services other than aircraft, manufacturers whose products are not used exclusively at the airport, general office space and such other buildings and improvements as determined by the commissioner to be not exclusively for aviation purposes. In regard to such non-aviation and substantial por-

tion related determinations and any proration of use or purpose for determination of in lieu of tax payments, such determinations shall be in accordance with the recommendations made by the Stewart airport commission or Republic airport commission and the affected municipalities or political subdivisions, respectively.

Notwithstanding the foregoing provisions of this subdivision if an agreement is made between the Stewart airport commission or the Republic airport commission and all municipalities or political subdivisions with respect to payments in lieu of taxes or the definition of "non-aviation purposes" such agreements shall be binding upon the commissioner with respect to such subjects, provided, however, that if there is no such agreement among all the aforementioned parties, the commissioner shall make such determinations based upon the recommendations of all the parties.

4. Once the Stewart airport commission and/or the Republic airport commission have been established, the commissioner and/or the department shall effectuate the authorizations, powers and/or duties set forth in this article with respect to Stewart airport and/or Republic airport only following the consultation, guidance, advice, and assistance of the Stewart airport commission and/or the Republic airport commission, respectively.

5. No toxic waste site or center shall be located or maintained at either Stewart airport including the surrounding area as contained in the metropolitan transportation authority project map number one thousand filed in

the Orange county clerk's office on August thirteenth, nineteen hundred seventy-one or Republic airport.

§ 401. Stewart airport commission. 1. Upon assumption by the department of transportation of jurisdiction over the airport facility and surrounding area located in the county of Orange, known as Stewart airport, there shall thereupon be created a Stewart airport commission. This commission will be an advisory council to the commissioner with respect to administration and management of the Stewart airport facilities and its surrounding areas with respect to projects to be undertaken and operations and management of the facilities at such airport. The commission shall be composed of seven members of which six must be residents of Orange county and one resident from Ulster county. By virtue of their offices, the commissioner of transportation or his designee and the Orange county executive shall be ex officio members of the commission. The members of the commission shall be appointed by the governor with the advice and consent of the senate and, except for the initial appointment terms, shall serve for a term of four years. However, two of the appointments must be from a list submitted by the temporary president and majority leader of the senate, and two must be from a list submitted by the speaker of the assembly. Initial appointments shall be to staggered terms with two of the nominees of the governor being made to initial one-year terms and the other nominee to an initial four-year term, the members nominated by the speaker of the assembly to initial two-year and three-year terms, respectively, and the members nominated by the temporary president and majority leader

of the senate to initial two-year and three-year terms, respectively. If any member shall thereafter no longer meet the residency requirement of his appointment, such position shall be declared vacant. In the event of a vacancy, the vacancy shall be filled in the same manner as the initial appointments except that the term shall be for the unexpired portion of the term of such members. All such members shall be deemed officers of the state in connection with the provisions of section seventeen of the public officers law. The members of the commission shall appoint a chairman from among their number. Each such member, except employees of the state, a political subdivision, or public corporation thereof, shall be entitled to a fee of one hundred fifty dollars per day when actually rendering service as a member, provided that the aggregate of such fees to any one member in any one fiscal year shall not exceed the sum of three thousand dollars. All members shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties.

2. The Stewart airport commission shall assist in the development of a program relative to the administration and management of the Stewart airport and to advise the commissioner of transportation with regard to such other programs relative to the Stewart airport as he may undertake. Such program shall include, but not be limited to identification of future capital needs, examining the means and methods of financing such future capital needs, the promotion and examination of the financing means and methods for the economic development of the area around the airport, the joining together of such economic develop-

ment and the airport operations, the identification and implementation of ways of working with the local community to accomplish the program and the identification of non-aviation uses and purposes and prorations of use or purposes for determinations of in lieu of tax payments. Once the commission has been established, the commissioner and/or the department shall effectuate the authorizations, powers and/or duties set forth in section four hundred of this article only following the consultation, guidance, advice and assistance of the commission. The Stewart airport commission shall meet at least six times a year at the call of the commissioner of transportation or the chairman of the commission and shall keep a record of all its proceedings and recommendations. Staff services for the commission shall be performed by personnel of the department of transportation. In carrying out the functions and responsibilities of the commissioner and the commission, the commissioner shall designate an executive secretary from among the staff of the department of transportation who will act as the administrative agent of the commission and assist the commission in fulfilling its duties and functions.

§ 402. Republic airport commission. 1. Upon assumption by the department of transportation of jurisdiction over the airport facility and surrounding area located in the county of Suffolk, known as Republic airport, there shall thereupon be created a Republic airport commission. This commission will be an advisory council to the commissioner with respect to administration and management of the Republic airport facilities and its surrounding areas with respect to projects to be undertaken and operations and management of the facilities at such airport. The com-

mission shall be composed of nine members to be appointed by the governor with the advice and consent of the senate and, except for the initial appointment terms, shall serve for a term of four years. By virtue of his office, the commissioner of transportation or his designee shall be an ex officio member of the commission. Four of the members shall be appointed from a list submitted by the temporary president of the senate setting forth the names of six persons who are residents of Nassau or Suffolk county, three persons who are residents of the town of Babylon and three persons who are residents of the Nassau county part of the Farmingdale school district. Two names shall be selected from the first class of residency and one name each shall be selected from the second and third classes of residency. Four of the members shall be appointed from a list sumitted by the speaker of the assembly setting forth the names of six persons who are residents of Nassau or Suffolk county, three persons who are residents of the town of Babylon and three persons who are residents of the Suffolk county part of the Farmingdale school district. Two names shall be selected from the first class of residency and one name each shall be selected from the second and third classes of residency. The ninth member shall be selected by the governor. In any event six members shall be residents of Suffolk county and three members shall be residents of Nassau county. Initial appointments shall be to staggered terms with the nominee of the governor being made to an initial four-year term, with the members nominated by the temporary president of the senate to initial two-year, three-year and four-year terms, respectively, and

the members nominated by the speaker of the assembly to initial one-year, two-year and three-year terms, respectively. If any member shall thereafter no longer meet the residency requirement of his appointment, such position shall be declared vacant. In the event of a vacancy, the vacancy shall be filled in the same manner as the initial appointments except that the term shall be for the unexpired portion of the term of such members. All such members shall be deemed officers of the state in connection with the provisions of section seventeen of the public officers law. The members of the commission shall appoint a chairman from among their number. Each such member, except employees of the state, a political subdivision, or public corporation thereof shall be entitled to a fee of one hundred fifty dollars per day when actually rendering service as a member, provided that the aggregate of such fees to any one member in any one fiscal year shall not exceed the sum of three thousand dollars. All members shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties.

2. The Republic airport commission shall assist in the development of a program relative to the administration and management of the Republic airport and to advise the commissioner of transportation with regard to such other programs relative to the Republic airport as he may undertake. Such program shall include, but not be limited to identification of future capital needs, examining the means and methods of financing such future capital needs, the promotion and examination of the financing means and

methods for the economic development of the area around the airport, the joining together of such economic development and the airport operations, the identification and implementation of ways of working with the local community to accomplish the program and the identification of non-aviation uses and purposes and prorations of use or purposes for determinations of in lieu of tax payments. Once the commission has been established, the commissioner and/or the department shall effectuate the authorizations, powers and/or duties set forth in section four hundred of this article only following the consultation, guidance, advice and assistance of the commission. The Republic airport commission shall meet at least six times a year at the call of the commissioner of transportation or the chairman of the commission and shall keep a record of all its proceedings and recommendations. Staff services for the commission shall be performed by personnel of the department of transportation. In carrying out the functions and responsibilities of the commissioner and the commission, the commissioner shall designate an executive secretary from among the staff of the department of transportation who will act as the administrative agent of the commission and assist the commission in fulfilling its duties and functions.

3. The arrival or departure of aircraft to or from the airport between the hours of 11 p. m. and 7 a. m., except in the case of emergency, and the development of additional runways at the airport are hereby prohibited, provided, however, that such prohibitions may be altered, modified or changed by resolution adopted by a majority vote of the

members of the commission after giving public notice of such alteration, modification or change and holding a public hearing thereon. Any alteration, modification or change which affects the prohibition with respeect to arrival and departure of aircraft shall be made only after due consideration to the peiod [sic] of daylight occurring at such airport. Notwithstanding the foregoing provisions of this subdivision, the prohibition against the arrival or departure of aircraft to or from the airport between the hours of 11 p. m. and 7 a. m. shall not become effective until ninety days after the effective date of this subdivision.

4. The commission, within one year from its creation, shall conduct a study on payments in lieu of taxes and improvement district taxes and charges with respect to aviation facilities which locate at Republic airport after the effective date of this subdivision and existing aviation facilities whose leases are renewed after the effective date of this subdivision. The commission shall conduct public hearings as part of such study and report its findings and recommendations to the commissioner and the legislature within one year after the commencement of such study of such findings and recommendations. The commissioner, in his discretion, may take such steps as may be necessary to implement any or all of such findings and recommendations.

§ 2. The sum of three million four hundred fifty thousand dollars ($3,450,000), or so much thereof as may be necessary, is hereby appropriated from the state purposes account to be paid as hereinafter provided to the department of transportation for services and expenses, including

those contracted for, of assuming the responsibilities for the program of planning, development, maintenance and operation of Stewart and Republic airports within the amounts appropriated herein. Within the amounts appropriated herein, authorization is granted to the department of transportation to carry out the purposes of this program and further to enter into contracts or agreements for such purposes, including but not limited to contracting with airport operators subject to the approval of the director of the budget; and further to use an appropriate amount of the appropriation for services and expenses connected with administering the transfer and operation of this program; and further to use an appropriate amount of the appropriation not to exceed two hundred fifty thousand dollars for services and expenses connected with administering the transfer and operation of said air national guard units. The moneys hereby appropriated, when made available pursuant to a certificate of approval of availability issued by the director of the budget, shall be paid out of the state treasury on the audit and warrant of the state comptroller on vouchers approved by the commissioner of transportation.

§ 3. The sum of two hundred fifty thousand dollars ($250,000), or so much thereof as may be necessary, is hereby appropriated from the state purposes account to be paid as hereinafter provided to the division of military and naval affairs for services and expenses related to planning, maintenance and operation of facilities of the organized militia occasioned by the move of air national

guard units from Westchester county airport to Stewart airport. With the amounts appropriated herein, authorization is granted to the division of military and naval affairs to carry out the purposes of this program; and further to use an appropriate amount of the appropriation for services and expenses connected with administering transfer and operation of said air national guard units. The moneys hereby appropriated, when made available pursuant to a certificate of approval of availability issued by the director of the budget, shall be paid out of the state treasury on the audit and warrant of the state comptroller on vouchers approved by the chief of staff to the governor.

§ 4. If any provision of this act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

§ 5. This act shall take effect immediately.

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No. 83-663

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK AND JAMES L. LAROCCA, COMMISSIONER, DEPARTMENT OF TRANSPORTATION OF THE STATE OF NEW YORK, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a suit in which the Eleventh Amendment bars monetary relief, the existence of an adequate remedy at law in state court precludes a federal court from entering a preliminary injunction against enforcement of an unconstitutional state statute.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 708 F.2d 92. The opinion of the district court (Pet. App. 9a-30a) is reported at 552 F. Supp. 255.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1983 (Pet. App. 33a-34a). A petition for rehearing was denied on July 21, 1983 (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on October 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The background of this case is set forth in the opinion of the district court (Pet. App. 10a-19a). Because petitioners have not disputed the district court's ruling on the merits, the relevant facts may be briefly summarized.

This suit was brought by the United States to challenge the action of the State of New York to transfer ownership and operation of Republic Airport from the Metropolitan Transportation Authority (MTA) to the New York State Department of Transportation (NYSDOT) and to impose a nighttime ban on the nonemergency use of Republic. Republic serves general aviation aircraft and relieves air traffic congestion at major airports in the New York City metropolitan area by providing an alternate base for such smaller, non-scheduled aircraft. Republic is one of only four airports in the area serving as a reliever airport that is capable of handling all types of aircraft at any time of the day or night in all weather conditions. Pet. App. 11a.

From 1967 to 1982, Republic was owned and operated by the Metropolitan Transportation Authority, a public benefit corporation that is authorized to enter into contracts and to acquire and hold real property. The MTA is independent of and not governed by the New York State Department of Transportation. Pet. App. 12a.

Between 1971 and 1981, the United States conveyed 97 acres of land to MTA at the Republic Airport site. In addition, the United States made nine grants totalling $6.8 million to MTA to acquire and improve the facilities at Republic. The conveyance and grants were subject to a number of covenants that MTA accepted as a condition of the federal aid, including the requirements that MTA keep the airport open to all types, kinds, and classes of aircraft on fair and reasonable terms; that it not dispose of or encumber its title or interest in Republic; and that it not

enter into any transaction that would deprive it of the ability to carry out any of the covenants unless the transaction was approved by the Federal Aviation Administration. Pet. App. 13a-16a. In addition, MTA expressly agreed in one of the grant awards that it would operate the lighting systems funded by the grant " 'throughout each night of the year' " (*id.* at 16a).

In June 1982, the New York legislature enacted a statute that transferred ownership of Republic from MTA to NYSDOT and imposed a mandatory nighttime curfew on the airport for all except emergency uses. The FAA did not approve the transfer of ownership to NYSDOT. Pet. App. 16a-18a.

2. In September 1982 the United States brought this action in the United States District Court for the Northern District of New York against petitioners, the State of New York and its Commissioner of Transportation. The United States alleged that the transfer of ownership of Republic impaired its contract rights with MTA, in violation of the Contract Clause of the Constitution (Art. I, § 10), and that the broad curfew unreasonably affected interstate commerce and interfered with federal regulation of aviation, in violation of the Commerce Clause (Art. I, § 8, Cl. 3) and the Supremacy Clause (Art. VI, Cl. 2). The United States sought injunctive and declaratory relief against the transfer of ownership and the nighttime curfew. Pet. App. 10a-11a, 18a.

Respondents Beechcraft East, Inc., and the Aircraft Owners and Pilots Association (AOPA) joined the action as plaintiffs. Beechcraft leases space at Republic for the sale and servicing of noncommercial aircraft. Beechcraft operates its facilities at Republic on a 24-hour basis. AOPA is an association of general aviation aircraft owners, some of whose members use Republic. Pet. App. 18a-19a.

Beechcraft moved for a preliminary injunction against the nighttime curfew. In support of its motion, Beechcraft submitted an affidavit showing that it would lose substantial business at Republic because of the curfew and that this loss of business would seriously affect its continued operations. Petitioners did not request a hearing on the issue. Pet. App. 19a, 21a-22a.

3. The district court granted the preliminary injunction. With respect to the likelihood of success on the merits, the court concluded that the curfew conflicted with federal law governing aviation and therefore was invalid under the Supremacy Clause (Pet. App. 23a-30a). In addition, the court found that Beechcraft would suffer an " 'actual and imminent' " business loss as a result of the curfew (*id.* at 22a) (citation omitted) and had no adequate remedy at law because the Eleventh Amendment "precludes Beechcraft from obtaining compensatory damages here" (Pet. App. 22a n.9). Following discovery, petitioners moved to vacate the preliminary injunction on the ground that Beechcraft had an adequate legal remedy in the New York Court of Claims. The district court denied this motion (*id.* at 7a-8a).

The court of appeals affirmed the preliminary injunction (Pet. App. 1a-6a). Petitioners did not challenge Beechcraft's showing of a likelihood of success on the merits, and instead limited the appeal to the issue of irreparable injury. The court of appeals rejected petitioners' argument that state law furnished an adequate legal remedy, holding that "in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available *federal* legal remedies" (*id.* at 4a) (emphasis in original).[1]

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[1]In view of this disposition, the court of appeals did not reach respondents' argument that state law in fact would not permit Beechcraft to obtain damages against New York in the circumstances of this

ARGUMENT

Petitioners challenge the court of appeals' affirmance of the district court's entry of a preliminary injunction. Although not contesting the district court's analysis of the merits, petitioners contend that the courts below erred in concluding that there was no adequate remedy at law because the Eleventh Amendment bars suits for damages by private plaintiffs against a state in federal court. Rather, they argue, federal equitable relief is inappropriate if state law provides an adequate legal remedy. The court of appeals correctly rejected this contention. Moreover, petitioners' contention ignores the principles that should govern the grant of preliminary injunctive relief in this case. Accordingly, further review is not warranted.

1. This Court has long recognized that "no adequate remedy at law exists, so as to deprive federal courts of equity jurisdiction, unless it is available in the federal courts." *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 217 (1938) (footnote omitted). Thus, "[i]f a plaintiff is entitled to be heard in the federal courts he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford." *Di Giovanni* v. *Camden Ins. Ass'n*, 296 U.S. 64, 69 (1935). The decision of the court of appeals therefore is in accord with "the settled rule that the measure of inadequacy of the plaintiff's legal remedy is the legal remedy afforded by the federal not the state courts." *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 297 (1943). See also *Atlas Ins. Co.* v. *Southern, Inc.*, 306 U.S. 563, 569 (1939) (footnote omitted) ("the accepted test

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case. For the reasons stated in the government's brief in the court of appeals (at 23-37), there is, at a minimum, a substantial question whether state law would provide damages for injuries suffered as a result of an unconstitutional statute. (A copy of the government's brief is being lodged with the Clerk of this Court.)

of legal adequacy * * * is the legal remedy which the federal, rather than state, courts afford"). And, at least in the absence of a pending state criminal or other enforcement action (compare, *e.g.*, *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977)), there is no basis in principles of comity to require federal courts of equity to defer to state legal remedies. See *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 930 (1975); *Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974); see also *Colorado River Water Cons. Dist.* v. *United States*, 424 U.S. 800, 817 (1976).

The cases cited by petitioners (Pet. 10) and amici (Br. 6-7) do not conflict with the decision below. *Matthews* v. *Rodgers*, 284 U.S. 521 (1932), is distinguishable because it was a suit to enjoin collection of a state tax. In holding that the district court erred in granting equitable relief, the Court emphasized the particular need for federal courts to avoid "interfer[ing] by injunction with [states'] fiscal operations" (*id.* at 525). See *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981).[2] Similarly, in *Pennsylvania* v. *Williams*, 294 U.S. 176 (1935), the issue was whether a federal district court or the Pennsylvania Department of Banking would supervise the liquidation of an insolvent

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[2]Courts of equity traditionally show "special deference * * * to state autonomy in matters concerning taxation and revenue," and *Matthews* thus constitutes a limited exception to the general rule that "[c]onsideration of the state remedy * * * [is] irrelevant * * *. Only the adequacy of the federal legal remedy would defeat federal equity jurisdiction." Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 Tex. L. Rev. 1141, 1156 (1977) (footnote omitted). See also, *e.g.*, Note, *Jurisdiction to Enforce Federal Statutes Regulating State Taxation: The Eleventh Amendment—Section 1341 Imbroglio*, 70 Yale L.J. 636, 642-643 (1961) (footnotes omitted) ("Ordinarily, injunctive relief will issue where there is no 'plain, adequate and complete' remedy available at law in the federal courts. In *Matthews* v. *Rodgers*, however, the Supreme Court noted that a more limiting principle prevails in suits brought to contest a state tax levy"). Congress subsequently codified this principle at 28 U.S.C. 1341.

Pennsylvania corporation. In holding that the district court should have deferred, as a matter of equitable discretion, to the state regulatory agency, the Court noted that the "question is not the ordinary one of comity between a federal and a state court" (294 U.S. at 183), and it stressed that the district court erred in not "refus[ing] to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest * * *. [In this case] exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers" (294 U.S. at 185). *Williams* thus did not turn on the adequacy of a plaintiff's legal remedies under state law. See Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits That "Interfere" with State Civil Proceedings*, 29 Stan. L. Rev. 27, 63 n.199 (1976).

It is clear that the federal remedies at law are inadequate in this case. Petitioners do not dispute that, under the Eleventh Amendment, a federal court could not award monetary damages to compensate Beechcraft for the injury caused by the State's invalid curfew. Accordingly, Beechcraft, as a litigant properly in federal court, was entitled to invoke the equitable powers of the court to protect it from such harm.[3]

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[3]Unlike the plaintiff in *Di Giovanni* v. *Camden Ins. Ass'n*, *supra*, upon which petitioners rely (Pet. 13-14), Beechcraft did not seek equitable relief in order to circumvent the jurisdictional limits imposed by Congress on the federal courts. See 296 U.S. at 70 ("The statute forbids resort to equity in the federal courts when they afford adequate legal relief. It does not purport to command that equitable relief shall be given in every case in which they fail to do so. Plainly it does not so command when the want of legal remedy is due to the express prohibition of Congress, applicable alike to suits at law and in equity"). While the grant of equitable relief in *Di Giovanni* would have been contrary to congressional policy, petitioners' claim that there is an adequate

Finally, petitioners' argument would skew the very notions of federalism that they seek to advance. The causes of action involved in this lawsuit arise under the Constitution and laws of the United States. As such, they are appropriate and fit for resolution in federal court. Nothing in our federalist system supports petitioners' assertion that these federal claims must be reformulated in terms of the State's waiver of sovereign immunity (assuming that state law in fact provides an adequate damages remedy, see note 1, *supra*) and submitted to the New York Court of Claims to the exclusion of the federal courts. See, *e.g.*, *Colorado River Water Cons. Dist.* v. *United States*, 424 U.S. at 813-814 (" '[i]t was never a doctrine of equity that a federal court should exercise its discretion to dismiss a suit merely because a State court could entertain it' ") (citation omitted); *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 415 (1964) (" 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * *. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied' ") (citation omitted). The fact that New York has chosen to waive its immunity in state court does not oust a federal court of its authority to adjudicate federal constitutional issues.

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monetary remedy under state law does not in any way render the equitable relief in the instant case inconsistent with the Eleventh Amendment.

Nor is there any basis for petitioners' suggestion (Pet. 5-7, 15) that Beechcraft's injury was insignificant and did not justify the preliminary injunction. The district court correctly found that "Beechcraft has demonstrated a business loss that is * * * 'actual and imminent.' * * * There is no requirement * * * that a party wait until near-extinction before moving for a preliminary injunction" (Pet. App. 22a-23a) (citation omitted).

Of course, a federal court of equity is not obligated to issue a preliminary injunction simply because there is no adequate remedy at law, as such cases as *Williams* and *Di Giovanni* recognize; in exercising its discretion, the court must, among other things, balance the relative equities between the parties and consider the overall public interest in the grant or denial of preliminary injunctive relief. Thus, the decision below does not mean that equitable remedies will be routinely applied in suits challenging state actions. But in considering the need for and appropriateness of equitable intervention, federal courts — at least, as here, in the absence of a pending state action — are not required to stay their hand in deference to state courts and remit plaintiffs to state remedies for the vindication of federal constitutional rights.

2. Beyond their lack of merit, petitioners' contentions do not address the issues that control the disposition of this case. For this reason as well, review of petitioners' claims is inappropriate.

We agree with petitioners that the district court erred in entering the preliminary injunction against the State. But the reason that the injunction was erroneous in this respect is not, as petitioners argue, that there was an adequate monetary remedy under state law. Rather, the injunction directly contravenes the Eleventh Amendment, which by its terms bars the "[j]udicial power of the United States * * * [in] any suit in law *or equity*" against a state (emphasis added). As this Court has recently noted, the Eleventh Amendment precludes "a suit to enjoin the State itself * * * [even though] no money judgment is sought. * * * [The Amendment] clearly applies to a suit seeking an injunction, a remedy available only from equity." *Cory* v. *White*, 457 U.S. 85, 90-91 (1982).

This error, however, does not warrant review of the preliminary injunction by this Court. First, the injunction was entered against the Commissioner of Transportation as well as against the State (Pet. App. 31a-32a). As a prospective decree against an individual state official, the injunction with respect to the Commissioner presents no Eleventh Amendment issue. See *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123 (1908).[4] Because this aspect of the preliminary injunction is fully adequate to afford the necessary relief pendente lite, vacating the injunction against the State *eo nomine* would have no practical effect. Moreover, although the State did not raise the Eleventh Amendment argument below in opposing Beechcraft's motion for a preliminary injunction and has not asserted it in this Court, the State remains free to seek an appropriate modification of the injunction in the lower courts. See *Edelman* v. *Jordan*, 415 U.S. at 677-678. Finally, the decision below is interlocutory; the preliminary injunction will be vacated by operation of law once the district court rules on the federal government's request for a permanent injunction.[5]

---

[4]Indeed, in their answer to Beechcraft's complaint, petitioners asserted the Eleventh Amendment as a defense only with regard to the State itself and not with regard to the Commissioner. See C.A. App. 237, 244-247.

[5]We note that if the United States had sought a preliminary injunction (rather than simply supporting Beechcraft's motion), no issue would be presented under the Eleventh Amendment. See *Employees* v. *Missouri Public Health Dep't*, 411 U.S. 279, 286 (1973); *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965); *Monaco* v. *Mississippi*, 292 U.S. 313, 329 (1934). In fact, petitioners recognized as much in not raising the Eleventh Amendment as a defense in their answer to the complaint filed by the United States. See C.A. App. 227-235, 446-455. This consideration further indicates the unsuitability of this case for resolving the larger issues raised by petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1984

DOJ-1984-01

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82-6343

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

83-663

Plaintiff-Appellee,

-and-

BEECHCRAFT EAST, INC.,

Intervenor-Plaintiff-Appellee,

-against-

THE STATE OF NEW YORK; and WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,

Defendant-Appellants.

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Plaintiff-Appellee,

-against-

WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York.

LODGING

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE UNITED STATES OF AMERICA

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 82-6343

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-and-

BEECHCRAFT EAST, INC.,

Intervenor-Plaintiff-Appellee,

-against-

THE STATE OF NEW YORK; and WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,

Defendant-Appellants.

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Plaintiff-Appellee,

-against-

WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE UNITED STATES OF AMERICA

STATEMENT OF ISSUES PRESENTED

1. Whether an applicant for a preliminary injunction in federal court who has no adequate remedy at law in federal court must also show the absence of an adequate legal remedy in state court as a prerequisite to obtaining preliminary injunctive relief?

2. Whether the State of New York has consented to be sued in its Court of Claims for the unconstitutional acts of its Legislature not involving the taking of real property?

3. Whether the State of new York has consented to be sued in its Court of Claims for lost busines revenues and customer goodwill occasioned by the State's taking of real property under its power of eminent domain?

4. Whether a showing of injury due to unconstitutional state conduct constitutes irreparable injury for purposes of preliminary injunctive relief regardless of whether the injury can be quantified in monetary terms?

5. Whether the record evidence of monetary injury was sufficient to justify a satisfactory showing of irreparable injury for purposes of preliminary injunctive relief.

INTRODUCTION

This is an action by the United States and by private parties against the State of New York for unconstitutionally assuming ownership of a general aviation airport in Suffolk County, Long Island known as Republic Airport, and for unconstitutionally imposing a nighttime ban on the use of the airport by all aircraft regardless of the levels of noise they make. Facing the prospect of severe business losses from the curfew, plaintiff Beachcraft East, Inc., which sells and services planes at Republic, moved below for entry of a preliminary injunction prohibiting New York from imposing the nighttime curfew. The motion was supported by the United States which had also prayed for a permanent injunction

of the curfew in its complaint. The court below granted Beechcraft's motion for a preliminary injunction finding first, that New York's curfew was overbroad and arbitrary and thus a violation of the Supremacy Clause of the United States Constitution, and second, that Beechcraft would suffer irreparable business damages because the Eleventh Amendment to the Constitution precluded suit in federal court against New York for monetary liability.

New York now asks this Court to vacate the lower court's preliminary injunction exclusively on the ground that Beechcraft has not demonstrated irreparable injury from the curfew. New York does not appeal the district court's finding that its curfew is unconstitutional.

This action is based on New York's passage of a law in June, 1982, purporting to take over the ownership of Republic Airport from the Metropolitan Transportation Authority (MTA) and to impose a total ban on all aircraft operations at Republic Airport between the hours of 11 p.m. and 7 a.m. daily. The airport curfew applies to all aircraft regardless of the noise level they make during landing or take-off.

The United States and Beechcraft East seek to have the statute declared unconstitutional and the airport curfew enjoined for violating three clauses of the federal Constitution: the Supremacy Clause, the Commerce Clause, and the Contract Clause.*/ Beechcraft, which is a tenant at Republic Airport

*/ The third plaintiff in this suit, the Aircraft Owners and Pilots Association (AOPA) does not allege that New York acted unconstitutionally under the Contract Clause. AOPA does allege that New York's curfew violates the Supremacy and Commerce Clauses.

leasing space from the MTA, does not claim that New York's actions constitute a de facto appropriation of its leasehold interest without just compensation in violation of either the United States or New York State Constitutions. Nor does Beechcraft contend in its complaint that New York's challenged law breaches existing contracts between the State and Beechcraft. Beechcraft's complaint is for injury to its business directly resulting from the state's passage of an unconstitutional law.

In support of the present appeal, New York suggests three grounds for reversal of the preliminary injunction with respect to the issue of irreparable injury. First, New York argues that Beechcraft can sue New York for lost business profits in its Court of Claims on a breach of contract theory or on a de facto appropriation of real property theory. Second, New York contends that assuming it cannot be sued for damages, Beechcraft, therefore, stands to incur a monetary injury without a remedy which is, in effect, no legally cognizable injury. Finally, New York concludes that Beechcraft has not shown that its financial injury will lead to bankruptcy which the State argues is a prerequisite for demonstrating irreparable injury. None of these arguments can withstand close scrutiny.

In support of its argument that Beechcraft has an adequate remedy in the New York Court of Claims, the State argues that Beechcraft can sue for lost profits on a breach of contract threory or on a de facto appropriation theory. Beechcraft's complaint, however, is not based on either theory. Yet, even if it were, Beechcraft could not prevail. Beechcraft does not allege, and New York does not indicate, that any contract exists between

itself and Beechcraft requiring that Republic Airport be kept open twenty-four hours each day. Without such a contract there, of course, can be no breach. New York's suggestion of an inferred de facto taking claim is no stronger. It is well-established under New York law that neither an owner nor a tenant of real property appropriated by the State under its power of eminent domain may recover for the loss of business profits or goodwill occasioned by the taking. Bopp v. State, 19 N.Y. 2d 368, 280 N.Y.S. 2d 135, 227 N.E. 2d 37 (1967). Beechcraft contends that these are its only losses since the challenged New York statute will not deprive Beechcraft of any part of its leasehold interest at Republic.

New York's alternate argument that the non-availability of a monetary remedy against the State means no injury ab initio and thus no injury capable of qualifying as irreparable injury simply stands logic on its head. It is the fact that Beechcraft cannot pursue a remedy for the loss of its business profits because of New York's sovereign immunity that makes the company's injury irreparable and the issuance of a preliminary injunction appropriate.

Similarly, New York's fallback position that Beechcraft has not shown enough potential injury to constitute irreparable injury confuses both the amount of injury that must be shown when no alternate remedy for that injury exists, and those cases decided by this Court concerning the nature of irreparable injury where the business enterprise applying for a preliminary injunction has a remedy for damages against the defendant in the first instance.

Where no damages remedy of any kind exists, equitable considerations underlying the need for a preliminary injunction clearly require a far lesser amount of monetary injury than when the party seeking the injunction has available an ultimate damages remedy. Regardless of whether Beechcraft is considered to have a damages remedy against New York, the severity of its potential business losses from New York's blanket ban on nighttime aircraft operations is sufficiently significant to satisfy this Circuit's requisite for irreparable injury where the moving party has an alternate remedy at law for damages.

New York has passed a law which the district court has found to be unconstitutional, and the State does not challenge that finding in this appeal. Beechcraft will undeniably suffer significant financial losses from imposition of the State's curfew. The two legal theories sugested by New York for possible recovery of those losses are transparently inadequate because no facts exist to support them (in the case of the breach of contract theory) or because state law forbids them (in the case of the de facto taking theory). A preliminary injunction banning the curfew is accordingly compelled by fundamental considerations of equity. The district court did not abuse its discretion in reaching this result and its grant of a preliminary injunction should not be disturbed.

STATEMENT OF FACTS

This is an action challenging New York's efforts to take over the ownership of Republic Airport in Suffolk County, Long Island, and to impose an 11 p.m. to 7 a.m. curfew on all flight operations

into and out of the airport. Republic is located approximately 20 miles east of John F. Kennedy ("JFK") International Airport. It is used by general aviation aircraft, such as small piston driven private planes and larger twin engine aircraft, for both pleasure and business purposes and for the non-scheduled charter flights of cargo and passengers. The airport is known as a "reliever airport" which means that Republic relieves New York's major commercial airports, JFK, La Guardia, and Newark, of general aviation aircraft. It is one of only four airports in the metropolitan New York City area whose primary function is to serve as a reliever airport which is capable of accommodating all aircraft types in all weather conditions around the clock (J.A. 204-05)*/. Because of Republic's proximity to JFK and La Guardia and its all weather capability for all aircraft types, the airport is a critical component of the Federal Aviation Administration's (FAA) National Airport System Plan.**/

A. Federal Funding Of The Airport

On May 6, 1971, the United States conveyed a substantial portion (94.7 acres) of the current airport property to the MTA. (J.A. 144)

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*/ "J.A." refers to the Joint Apendix.

**/ Nov. 5, 1982 deposition of Paul L. Galis, pp. 26-28, submitted as Ex. C to Dec. 6, 1982 affidavit of Barrie L. Goldstein in opposition to motion of the United States for a protective order, filed Dec. 8, 1982.

The MTA is a public benefit corporation created by special act of the New York State Legislature. N.Y. Public Authorities Law §1260, et seq. It is a corporation given the power to enter contracts, §1265(6), and to acquire and hold real property, §1265(7). The MTA is independent of and is not governed by the supervisory powers of the New York State Department of Transportation (SDOT), §1266(8). The MTA may be both sued, §1276(1), and be held liable in tort for money damages, §1276.

Pursuant to the foregoing powers, the MTA, in exchange for the conveyance of Republic Airport property, expressly convenanted in the deed of conveyance:

> That all facilities of the Airport developed with Federal Aid and all those useable for landing and taking off of aircraft will be available to the United States at all times, without charge, for use by aircraft of any agency of the United States in common with other aircraft...

Deed, ¶8, J.A. 148 (emphasis added). The MTA also promised in the deed that "any subsequent transfer of property interests conveyed hereby will be made subject to all of the convenants, conditions and limitations contained in the instrument." Deed, ¶5, J.A. 147.

During the past eleven years of MTA's ownership of Republic Airport, the federal government has made nine grant awards to MTA for acquiring and improving the facilities at Republic. These awards totaled $6,820,782. (J.A. 206) The improvements have included, inter alia, the installation of navigational equipment, runway lighting, improvement of runway markings, and construction of drainage and fencing.

Among the covenants included in the grant agreements are the following:

> (1) not to dispose of or encumber its title or interest in Republic (Assurance No. 10, J.A. 153);
>
> (2) not to enter into any transaction which would deprive MTA of the ability to carry out all of the grant covenants unless by such transaction the obligation to perform the convenants is assumed by an agency approved by the FAA (Assurance No. 32, J.A. 155);
>
> (3) keep Republic airport open to all types, kinds, and classes of aeronautical use on fair and reasonable terms (Assurance No. 18, J.A. 154);
>
> (4) operate and maintain in a safe and serviceable condition, and whenever required, all of the airport's facilities needed to serve aeronautical uses, including the promise to have in effect, at all times, arrangements for operating the facilities (Assurance No. 22, J.A. 154); and
>
> (5) make available to the United States at all times, all of the airport's facilities developed with federal aid or used for the landing and taking off of aircraft (Assurance No. 26; J.A. 155).

In addition to these general convenants, MTA expressly agreed in the second of the nine grant agreements to operate the lighting systems funded by the grant "throughout each night of the year." Project No. 8-36-0028-02. (J.A. 208).

B. The Challenged Legislation

On June 23, 1982, the New York State Legislature enacted a statute (1) divesting MTA of its ownership of Republic Airport, (2) vesting ownership and operational responsibilities over the

airport in the State's Department of Transportation, (3) imposing a mandatory 11 p.m. to 7 a.m. curfew on the airport, except for emergency use, and (4) vesting exclusively in a citizen's commission (known as the Republic Airport Commission) the power to modify the curfew after notice and hearing. S.9450-A adding Article 15 to the Transportation Law of the State of New York by Chapter 370 of the Laws of 1982. A copy of the legislation appears at pages 101-109 of the Joint Appendix and is referred to herein as S. 9450-A.

Contrary to the referenced deed and grant covenants, neither the MTA nor the State of New York at any time obtained the FAA's permission to transfer ownership of the airport from the MTA to the State Department of Transportation. The curfew provisions of the legislation went into effect September 20, 1982.

In an undated "Notice to Airport Users" from Carl L. Stacy, Airport Manager, notice was given that

> REPUBLIC AIRPORT will be closed to aircraft operations between the hours of 11:00 p.m. and 7:00 a.m. commencing September 19 1982. During those hours the arrival and departure of aircraft is prohibited and no services will be provided by the airport operator such as runway lighting, navigational aids, landing or takeoff aids and crash-fire-rescue services.

Ex. 13 submitted in support of Plaintiff's (United States) Response To Motion of Beechcraft East, Inc. To Intervene And For A Preliminary Injunction, filed September 28, 1982 (emphasis added).

New York's decision to turn off runway lighting and naviagational aids, in addition to declaring the airport closed during curfew hours, presented, in the FAA's view, serious safety hazards (1) to those using the airport for emergency nighttime landings, (2) to those intending to land before 11 p.m. but delayed by adverse weather conditions, and (3) to those intending to use the lighted airport as a navigational aid while going to or from nearby La Guardia and JFK airports. The FAA expressed these concerns to counsel for defendants in a meeting on September 15, 1982. The following day, defendnts agreed not to turn off runway lighting and navigational aids pending litigation of the issue in this case.*/

Notwithstanding defendnts' concession on the safety-related issue of lighting and navigational aids, defendants declined to rescind transfer of the airport or the imposition of the curfew. As a result, the United States filed the instant action seeking injunctive and declaratory relief (J.A. 19) on September 17, 1982. By leave of court, the United States filed a first amended complaint on November 19, 1982 (J.A. 433).

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*/ Contrary to defendants' statement of the case at pages 7-9 of their brief, the FAA never agreed to forebear from seeking a preliminary injunction on the matter of the curfew if New York left on lighting and navigational aids during nighttime hours. The only preliminary injunction the FAA agreed not to seek was one pertaining to runway lights and navigation equipment. Because the question of a promise, vel non, not to seek a preliminary injunction on the curfew is wholly irrelevant to any issue presented below or in this appeal, the United States has not made of record any evidence refuting the hearsay allegations of defendants' affiant Clarence Cook (J.A. 81) on this point.

C. The United States' Case

The United States contends that New York violated three provisions of the Constitution when it passed S. 9450-A. First, the United States alleges that the law violates the Contract Clause of the Constitution, Art. I, Sec. 10, by impairing contract rights and obligations between the United States and the MTA. As previously noted, controlling grant agreements between the federal government and the MTA provided that the ownership of Republic Airport could not be changed without FAA approval. The United States alleges that New York never obtained approval from the FAA to assume ownership of Republic. S. 9450-A which legislatively mandates an unconsented transfer, therefor, impairs the federal government's contract rights in violation of the contract Clause of the Constitution. As a result, the United States contends that the transfer provisions of S. 9450-A are void ab initio and that New York is not the lawful owner of Republic Airport.

The United States additionally alleges that the nighttime curfew violates not only the Contract Clause of the Constitution, but also the Supremacy Clause, Art. VI, and the Commerce Clause, Art., Sec. 8. Controlling Supreme Court precedent recognizes that the power to control aircraft noise at airports has been preempted by Congress to the exclusion of all persons and entities (including municipalities) except airport owners. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973). The government alleges that airport owners, however, may only take limited action to abate aircraft noise. As this Court held in British Airways Board v. Port Authority of New York, 558 F.2d 75,

84 (2d Cir. 1977), an airport owner is vested "only with the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs." The United States contends in this case that since New York's efforts to become the proprietor of Republic Airport were void ab initio in light of the Contract Clause's prohibition on the impairment of contract rights, the State cannot avail itself of the proprietor exception to noise abatement plans recognized by the Supreme Court in City of Burbank, supra. Accordingly, the curfew stands in violation of the Supremacy Clause. It was the position of the government below that this violation of the Supremacy Clause was compounded by the fact that the legislation adopting the curfew was itself a product of an exercise of New York's police power in violation of the proscriptions established by the City of Burbank, supra.

The federal government additionally contends in this case that even assuming New York is held to have imposed the curfew in its capacity as a lawful airport proprietor, the curfew is overbroad, unreasonable, and arbitrary and thus violative of the Supremacy and Commerce Clauses for reasons recognized by this Court in British Airways, supra.

Beechcraft also pleads each of the foregoing theories of constitutional infirmity with respect to S. 9450-A. J.A. 20-21, ¶¶2, 6, and 7. Beechcraft does not plead any causes of action against New York based on breach of contract or on the de facto appropriation of its leasehold interest at Republic.

D. Proceedings Below

The United States filed its complaint on September 17, 1982. On September 22, 1982, Beechcraft East filed an order to show cause for leave to intervene and for a temporary restraining order and a preliminary injunction. On September 28, 1982, the United States filed a brief supporting Beechcraft's motion for a preliminary injunction with respect to the issue of likelihood of success on the merits. The United States did not take a position on the issue of irreparable harm because, at the time, it lacked knowledge of the nature of Beechcraft's claimed financial injury. Oral argument was heard by the district court on October 1, 1982, and on October 7, 1982, the lower court granted Beechcraft's motion to intervene and its motion for a preliminary injunction. J.A. 199. The court supplemented its order granting the preliminary injunction with a Memorandum Decision and Order filed October 14, 1982. United States v. State of New York, 552 F. Supp. 255 (N.D.N.Y. 1982), J.A. 203.

Beechcraft's complaint incorporated by reference all allegations and counts of the complaint filed by the United States J.A. 20, ¶2. In addition, Beechcraft included a Commerce Clause count not made by the United States in its original complaint, and a Supremacy Clause count that was slightly broader in scope than the federal government's original Supremacy Clause count. J.A. 21, ¶¶6 and 7.

On October 22, 1982, the lower court also consolidated a related action that had been filed against the State by AOPA. AOPA, like Beechcraft, attacked the curfew legislation on Supremacy and Commerce Clause grounds.

On November 19, 1982, the United States filed a first amended complaint which expanded the scope of its Supremacy Clause count and added a Commerce Clause count. J.A. 433. The amended pleadings made the complaints of all three plaintiffs coextensive with respect to Supremacy and Commerce Clause allegations. Contract Clause counts were presented only by the United States and Beechcraft.

In its supporting memorandum, the district court found that Beechcraft had satisfied this Circuit's requirements for preliminary injunctive relief by making a clear showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious question going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. 552 F. Supp. at 261, J.A. 211. On the issue of irreparable harm, the lower court noted that Beechcraft had demonstrated a business loss "that is certainly not remote or speculative, but [is] actual and imminent." Id. at 262, J.A. 214. In reaching this finding, the court relied on evidence submitted by Beechcraft showing that as the result of the curfew, over twenty-five customers had given notice of their intention to relocate to another airport, with additional cancellations coming in daily. Id. at 261-62, J.A. 212. After finding the existence of business losses due to New York's curfew, the lower court found that Beechcraft had no adequate remedy at law against the State in light of the Eleventh Amendment. Id. at 262, J.A. 214. The court noted on this point:

> For this loss there is no adequate remedy at law, and, therefore, the fact that the loss may be only a small percentage of Beechcraft's nation-wide and international revenue is irrelevent. There is no requirement in this Circuit that a party wait until near-extinction before moving for a preliminary injunction. The law, like the Constitution, is not a suicide pact.

Ibid.

With respect to Beechcraft's likelihood of prevailing on the merits of its constitutional claims, the lower court focused on plaintiffs' claim that New York's curfew violated the Supremacy Clause of the federal Constitution. The court noted that under City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), the Supreme Court had found that Congress had preempted the area of airport noise control for the FAA, with the exception that airport proprietors were given "special, although undefined, leeway in controlling the sources of aircraft noise directly." 552 F. Supp. at 263, J.A. 217. The lower court then noted that this Court gave definition to that "leeway" in British Airways Board v. Port Authority of New York, 558 F.2d 75 (2d Cir. 1977), when it held that in light of congressional efforts to preempt the area of airport noise control, an owner is vested "only with the power to promulgate reasonable, non-arbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs." 552 F. Supp. at 264, J.A. 220, quoting from British Airways, supra, 558 F.2d at 84.

On the basis of the record, the lower court found that New York's curfew law, S. 9450-A, is "overbroad, unreasonable and arbitrary." 552 F. Supp. at 265, J.A. 220. The court noted in support of its finding that:

> [t]he curfew extends to all aircraft, regardless of the degree of accompanying emmitted noise. In fact, Article 15 makes no reference to noise levels measured in decibles as a factor in particular plane prohibition during the 11:00 P.M. to 7:00 A.M. curfew.
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> ** ** **
>
> Moreover, as the Sate admits, only 14 flights occur during the forbidden hours -- a mere 2.6 percent of the total daily aircraft traffic. A total proscription of flights during the curfew period, it seems to this court, is unreasonable in view of the sparsity of flights during the curfew hours."

Ibid. (emphasis in the original).

Following the court's opinion, the State took discovery of Beechcraft to determine the extent of its contemplated financial losses due to the curfew. Following this discovery, the State moved to vacate the preliminary injunction. The State did not base its motion on the court's finding that the curfew was unconstitutional. Instead, the State limited its motion to the issue of whether Beechcraft had truly demonstrated irreparable injury. At oral argument on the motion, the court reaffirmed its earlier ruling that the State had not waived its sovereign immunity from suit for lost business profits occasioned by the curfew. J.A. 430. The State now appeals from the denial of its motion to vacate. Because the district court was correct in concluding that

New York had not waived its immunity from suit for money damages in the context of the facts presented by this case, the lower court's preliminary injunction should not be set aside.

ARGUMENT

SUMMARY

The major portion of New York's argument in support of setting aside the injunction of its airport curfew is that Beechcraft East has an adequate remedy at law for money damages against the State in its Court of Claims. There are two errors with this contention. First, the existence, vel non, of an adequate legal remedy in state court is irrelevant to the question of whether an injunction should issue in federal court. What is relevant is the question of whether the movant has an adequate remedy at law in federal court. If he does not, then for purposes of issuing an injunction, he has satisfactorily demonstrated the inadequacy of a legal remedy irrespective of whether he has one in state court. Di Giovanni v. Camden Fire Insurance Ass'n, 296 U.S. 64, 69 (1935). New York does not contend that Beechcraft has a legal remedy against the State in federal court. As a result, there was no error in the lower court concluding that Beechcraft lacked an adequate remedy at law against the State.

Yet even if the district court were required to consider the adequacy of legal remedies in state court, New York has not waived its sovereign immunity from the type of action presented by the present case. All plaintiffs, including Beechcraft, sue the State on account of injury caused by implementation of an unconstitutional statute. It is a well-established principle of New York

State law that the State cannot be held monetarily liable for the unconstitutional actions of its Legislature which do not involve the taking of real property. Fonfa v. State, 88 Misc. 2d 343, 388 N.Y.S. 2d 65 (Ct. Cl. 1976).

New York replies that Beechcraft's case is really one for breach of contract and for the de facto taking of its leasehold interest in Republic. There are several shortcomings with this argument. First, Beechcraft never pleads either cause of action in its complaint. Second, insofar as New York claims to be the successor in interest to contracts between Beechcraft and the MTA prohibiting curfews, Beechcraft and the United States claim that New York's efforts to take over the airport and succeed as the successor in interest to those contracts were voided ab initio by operation of the Contract Clause of the Constitution. Third, Beechcraft could not recover against New York on a de facto taking theory because state law prohibits the recovery of lost business revenues or customer goodwill (Beechcraft's only losses) as the result of property taken by the State under its power of eminent domain. Bopp v. State, 19 N.Y. 2d 368, 280 N.Y.S. 2d 135, 227 N.E. 2d 37 (1967).

In the alternative, the State argues that even if Beechcraft was without a legal remedy, it was reversible error for the district court to make a related finding of irreparable injury solely on the basis of no adequate remedy at law. Contrary to the State's position on this point, the lower court's action of merging the two tests for injunctive relief was proper when the basis for finding no adequate remedy at law was the absolute

inability of Beechcraft to ever obtain money damages from the State. Ohio Oil Co. v. Conway, 279 U.S. 813 (1929).

Yet even if the lower court were required to look elsewhere for a finding of irreparable injury to support the issuance of a preliminary injunction, two valid grounds existed. First, the fact that Beechcraft had alleged and the lower court had found that New York had acted unconstitutionally in enacting a curfew, constituted a prima facie showing of irreparable injury. Henry v. Greenville, 284 F.2d 631, 633 (4th Cir. 1960). Second, Beechcraft's showing that absent an injunction it would suffer significant business losses and go out of business at Republic, was sufficient under the law of this Circuit to establish a showing of irreparable injury. Semmes Motor, Inc. v. Ford Motor Company, 429 F.2d 1197 (2d Cir. 1970).

At issue in this appeal is the existence of state conduct that has been found to be unconstitutional, conduct which will cause Beechcraft to lose substantial business revenues, and conduct for which there is no legal remedy in either federal or state court. Under these circumstances, it was undeniably proper for the lower court to find that Beechcraft had made a satisfactory showing of irreparable injury. No argument advanced by the State justifies setting aside this ruling.

I. BEECHCRAFT HAS NO DAMAGES REMEDY AGAINST NEW YORK IN FEDERAL COURT

The lower court found that Beechcraft would be irreparably injured by New York's curfew because the company had no remedy at law against the state in federal court in light of the Eleventh

Amendment. 552 F. Supp. at 262, J.A. 214. New York contends that the district court erred in concluding Beechcraft lacked an adequate remedy at law because the State's Court of Claims Act permits Beechcraft to sue the state for money damages in its own state court system. Implicit in the State's argument is the position that a contention of an inadequate remedy at law cannot be sustained if there is an adequate remedy in state court although there is no adequate legal remedy in federal court. This position is wrong as a matter of law.

It has long been held by the Supreme Court that the measure of whether a legal remedy is adequate for purposes of determining the appropriateness of an injunction is based on the existence of a legal remedy in federal court alone. Alabama Comm'n v. Southern R. Co., 341 U.S. 341, 359 (1951); DiGiovani v. Camden Fire Insurance Assn., 296 U.S. 64, 69 (1935). Accord, Oneida Indian Nation of New York State v. County of Oneida, New York, 464 F.2d 916, 922 (2d Cir. 1972). Commenting on the measurement of an adequate remedy at law in the context of considering a request for injunctive relief, the Supreme Court has noted:

> It is true, as this Court has often pointed out, that the inadequacy prerequisite to relief in a federal court of equity is measured by the character of remedy afforded in federal rather than in state courts of law. This follows from the nature of "equity jurisdiction" of the federal courts.

** ** **

> If a plaintiff is entitled to be heard in the federal courts he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford.

DiGiovanni v. Camden Fire Insurance Ass'n, supra, 296 U.S. at 69 (citations omitted) (emphasis added).

New York neither contends nor suggests that Beechcraft has an adequate remedy at law against the State for damages in federal court. The State's only suggested legal remedy is in its own Court of Claims. As noted above, such a forum for legal redress is wholly irrelevant to the question of whether Beechcraft has an adequate remedy at law for purposes of considering the appropriateness of a preliminary injunction in federal court.*/ The lower court's reliance on the existence, vel non, of an adequate legal remedy in federal court was legally required as a matter of federal law and should not be reversed.

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*/ The existence of an adequate state court remedy may in limited curcumstances, not present here, be considered by a federal court in deciding whether to grant an injunction where the interest of a plaintiff is "relatively unimportant when compared to some overwheming public interest." Alabama Comm'n v. Southern R. Co., supra, 341 U.S. at 360. A leading example is the appropriateness of considering the state court remedies of a state criminal defendant who seeks to enjoin a state criminal proceeding. Younger v. Harris, 401 U.S. 37 (1971). Despite the arguable public interest in the State's curfew by homeowners living close to Republic Airport, their interest is purely a local one of restricted dimensions and in no realistic sense can be characterized as "overwhelming" from a state-wide perspective. See generally, Allied Structural Steel Co. v. Spannus, Attorney General of Minnesota, 438 U.S. 234, 248-249 (1978).

II. BEECHCRAFT HAS NO DAMAGES REMEDY AGAINST NEW YORK IN STATE COURT

Notwithstanding the foregoing discussion of controlling Supreme Court law holding that the existence of an adequate remedy at law is based on the adequacy of a legal remedy in federal and not state court, the legal result obtains that even in state court Beechcraft has no adequate remedy at law against New York.

The nub of Beechcraft's case against the State is that it will lose business revenues because of New York's statutorily imposed curfew at Republic Airport. New York responds that if it has acted improperly in establishing the curfew, Beechcraft can recover its anticipated losses against the State under New York's Court of Claims Act. New York is in error. The Court of Claims Act only waives the State's liability for money damages with respect to actions that can be brought against individuals or companies, such as actions in tort or for breach of contract.

The case at bar is not a tort suit, not a breach of contract action, nor a claim for the wrongful taking of property. In short, the instant action is about damage caused by New York's implementation of an unconstitutional law not involving the appropriation of real property. New York law is abundently clear that the State has not waived its liability for money damages on account of such sovereign conduct. As a result, Beechcraft has no adequate remedy at law against the State.

A. New York Has Not Waived Its Liability For Money Damages For The Unconstitutional Act Of Its Legislature.

The State pitches the major portion of its appeal on New York's Court of Claims Act. Section 8 of the Act provides:

> The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court aqianst individuals or corporations ....

(Emphasis added.)

Section 9 of the Act further provides with respect to the jurisdiction of the Court of Claims:

> To hear and determine a claim of any person, corporation or municipality against the state for the appropriation of any real or personal property of any interest therein, for the breach of contract, express or implied, or for the torts of its officers or employees while acting as such ...

As reflected by the foregoing statutory language, the Court of Claims Act waives New York's immunity from liability only with respect to actions that can be brought against "individuals or corporations." Act, § 8. The "waiver of immunity by the State (Court of Claims Act, § 8) is inapplicable here where the activity complained of is sovereign in character and cannot be likened to functions which could be carried on by a private person or corporation." Bernkrant v. State, 26 A.D. 2d 964, 274 N.Y.S. 2d 749 (3d. Dept. 1966) [No waiver of immunity by State for damages caused by State Rent Administrator who refused to approve a tenant eviction]. Accord, Southworth v. State, 62 A.D. 2d 731, 405

N.Y.S. 2d 548, aff'd 47 N.Y. 2d 874, 419 N.Y.S. 2d 71, 392 N.E. 2d 1254 (1979); Granger v. State, 14 A.D. 2d 645, 218 N.Y.S. 2d 742 (3d Dept. 1961).

In the case at bar, Beechcraft contends that it will suffer substantial business losses leading to financial collapse from the State's imposition of a blanket curfew at Republic Airport pursuant to legislation enacted by the State Legislature. Beechcraft contends that the legislation, which mandates the curfew, unconstitutionally violates the Supremacy, Commerce, and Contract Clauses of the United States Constitution. See Beechcraft Complaint, ¶¶ 2, 6, and 7, J.A. 20-21. Beechcraft does not plead a breach of contract count against the State or a count based on the de facto taking of its leasehold interest at Republic. The sole and exclusive predicate for Beechcraft's alleged damages is that it was injured as the result of an unconstitutional state law.

Individuals and corporations not being sovereigns cannot pass laws (whether constitutional or not) and, thus, actions in damages cannot be brought against them for the results of such legislation. For this reason, section 8 of New York's Court of Claims Act does not waive the State's immunity from liability for the consequences that flow from laws enacted by its legislature, even if they are unconstitutional.

In a Court of Claims case squarely on point, the Court held that New York had not waived immunity from liability for the enactment of unconstitutional statutes. Fonfa v. State, 88 Misc. 2d 343, 388 N.Y.S. 2d 65 (Ct. Cl. 1976). In Fonfa, claimant sued the State for illegal arrest and detention pursuant to an

allegedly unconstitutional state statute. Taking as true claimant's allegations that the statute in question was unconstitutional, the Court of Claims noted:

> On that basis, the legal question becomes: In this court of limited jurisdiction, can the state be held liable for its enactment of statutes later declared unconstitutional? My answer is: No.

Id at 67. Quoting from a State Court of Appeals decision in Barrett v. State of New York, 220 N.Y. 423, 425 (1917), the Court of Claims in Fonfa observed:

> We know of no principle of law under which the state becomes liable because of the adoption of an unconstitutional statute.

Ibid.

The rationale for this result stems from the obvious fact, noted above, that enactment of legislation is inherently a sovereign responsibility for which no private person or corportion could be sued. As noted by the Appellate Division of the New York Supreme Court in Newiadony v. State of New York, 276 App. Div. 59, 61; 93 N.Y.S. 2d 24, 26 (3d. Dept. 1949), quoted with approval by the Court of Claims in Fonfa, id. at 68:

> How far the argument of full analogy of State to private acts may run will be illustrated if the consequences of legislative policies be considered. Often laws enacted for the public welfare are destructive of private activities. If an individual or corporation acted thus destructively there could be no doubt that remedy would be readily found in the courthouse.

> But the inconveniences of legislative dispositions of policy are not a proper subject for claims against the government. No government could function thus hedged in by lawsuits. If it were the legislative intention to assume a liability on any such revolutionary scope, it would demand unmistakeable language.

Aside from the foregoing characterization of Beechcraft's complaint as one not involving a conract or de facto taking count, New York does not disagree with any of the cited legal principles including the holding of Fonfa, supra. Indeed, the State candidly acknowledges that the "passage of legislation is an act only performed by the sovereign." State's Brief at 24. Thus, the only issue presented by the State's argument on this point is whether this case involves some type of additional, presumably non-articulated, cause of action for which the State has consented to be sued under its Court of Claims Act. If, in the final analysis, this case is only about injury caused by an unconstitutional state law not involving the taking of real property, all parties agree that Beechcraft has no damages remedy against New York.

B. New York's Suggested Legal Theories Are Inadequate.

Recognizing the correctness of Fonfa, supra, the State attempts to remedy the previously discussed shortcoming in its Court of Claims argument by arguing for the first time in this case that Beechcraft affirmatively pleads causes of action which

can be remedied under the Court of Claims Act.*/ Two counts are alleged. The first is a breach of contract cause of action, and the second is one based on a de facto appropriation of a real property interest. As discussed below, neither count is alleged, and if either were, neither could succeed.

1. No Contracts Prohibiting A Curfew Are Alleged By Beechcraft To Have Existed Or Been Breached.

New York contends Beechcraft has plead a breach of contract count against the State based on paragraphs 8-12 of Beechcraft's Complaint and on paragraphs 24-28 and 33-37 of the United States' Complaint which Beechcraft incorporates by reference. State's Brief p. 21. An inspection of these paragraphs denies the State's contentions.

Paragraphs 8-12 of Beechcraft's Complaint, J.A. 21-22, allege that Beechcraft entered into a contract with the MTA for the purpose of leasing land and facilities at Republic Airport owned by the MTA. Beech Complaint, ¶8, J.A. 21. Beechcraft does not allege in its Complaint, and New York has never contended, that MTA agreed under the leasing agreement to keep Republic open 24 hours each day. Beechcraft does allege that it entered into service contracts with customers using Republic's facilities to

*/ In its motion to vacate the preliminary injunction, the State raised for the first time the availablity of a remedy under its Court of Claims Act. While it indicated the general types of actions that could be brought against the State under the Act, it did not indicate which of Beechcraft's counts qualified for review under that Act. It is only in its brief on appeal that the State, for the first time, advises plaintiffs how Beechcraft might proceed.

provide "twenty-four hour service and flights on demand." Beech Complaint ¶11, J.A. 22. Again, Beechcraft makes no allegation, however, that the MTA or the State Department of Transportion was a party to these agreements.

Beechcraft's allegations in its complaint do not affirmatively plead any contract with the MTA or the State requiring that the airport be left open around the clock. And as noted, New York does not contend itself that such agreements actually exist.

Examination of allegations made in the Complaint of the United States, and adopted by Beechcraft, also fails to reveal any cognizable breach of contract counts capable of advancement by Beechcraft. Paragraphs 24-28 of the federal government's Complaint, J.A. 14-15, are for violations of the Contract Clause of the Constitution, Art. I, Sec. 10, and not for a breach of contract. Specifically, the United States alleges that its contract rights with MTA requiring FAA approval of Republic's transfer and the 24 hour availability of the airport for the government's use were impaired by New York's passage of S. 9450-A. This count is clearly one for unconstitutional conduct by a sovereign state in contravention of Article I, Section 10 of the Constitution. It is not for a breach of contract.

Paragraphs 33 through 37 of the United States are breach of contract counts against the State. For two reasons they do not state causes of action on which Beechcraft could prevail. First, the contracts alleged are the nine grant agreements and one deed of transfer between the United States and the MTA. Beechcraft was

not a party to these agreements. As a result, Beechcraft can only claim third party beneficiary status from these covenants. But it is well-established in the field of federal grant and contract law that one who is not a recipient of federal monies may not claim third party beneficiary status for purposes of securing damages if the grant or contract is not honored. Merritt v. United States, 267 U.S. 338, 341 (1925).*/ The State agrees with this contention. Relying on Cort v. Ash, 422 U.S. 66 (1975), and Nat'l Aviation v. City of Hayward, 418 F. Supp. 417, 429 (N.D. Cal. 1976), New York argued below:

> We submit that the federal statutes and the grants upon which the FAA bases its claim do not establish a private right of action [for Beechcraft] since Beechcraft was not intended to be a third-party beneficiary and [sic] thereunder.

Defnd's Mem. of Law In Opposition To The Proposed Intervenor's Motion For A Preliminary Injunction at 5 n.(*), filed Sept. 30, 1982. In light of these precedents, and for reasons articulated by New York below, Beechcraft has no cause of action against the State for alleged violations of grant obligations it would have undertaken as MTA's lawful successor in interest.

Both Beechcraft and the United States allege, however, that New York is not MTA's lawful successor in interest because the Contract Clause voids ab initio the attempt of S. 9450-A to

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*/ Accord, Gardiner Manufacturing v. United States, 479 F.2d 39 (9th Cir. 1973); Brister & Koester Lumber Corp. v. United States, 90 F. Supp. 695 (Ct. Cl. 1950).

transfer ownership of Republic Airport.*/ Thus, even assuming Beechcraft could claim third party beneficiary status with respect to contracts between the United States and the MTA, the State is not a successor in interest to those agreements and no contract exists with the State to be breached.

New York's allegations of contract counts by Beechcraft are thus denied both by the facts of this case and by controlling law.

2. New York Law Prohibits Recovery Of Lost Business Profits Resulting From The State's Appropriation Of Real Property.

In the alternative to a suggested breach of contract claim, New York contends that Beechcraft can recover against the State on a de facto appropriation of real property theory. The State does not contend that Beechcraft has even alleged such a cause of action but only that it has been "implicitly stated" in paragraphs 13 through 15 of its Complaint. State's Brief at 21.

Beechcraft, however, has neither stated nor implied a cause of action for the de facto taking of all or part of its leasehold interest at Republic. Paragraphs 13 through 15 of its complaint simply allege that it will suffer severe business losses if the curfew is allowed to proceed unenjoined. J.A. 23. This is merely a statement of injury and not of a legal theory for recovery.

*/ The Supreme Court has held that a state law which impairs a contract right in violation of the Contract Clause is "not a law" because the Constitution forbids it. Poindexter v. Greenhow, 114 U.S. 270, 288 (1884). New York, thus, does not stand in MTA's shoes with respect to any contract agreements between MTA and the federal government over the operation of Republic.

It is not surprising that Beechcraft has declined to plead a de facto taking theory for an inspection of New York law reveals that such a cause of action for lost business revenues is not recognized.

The State of New York may appropriate the property of its citizens either by the power of eminent domain or by its police power. While both have "much in common...there is nevertheless a sharp distinction between them." 19 N.Y. Juris. Eminent Domain § 2, p. 191. The "state takes property by eminent domain because it is useful to the public and under the police power because it is harmful." Lemp v. Town Bd. of Islip, 90 Misc. 2d 360, 394 N.Y.S. 2d 517, 521 (Sp. Ct. 1977).

The power of eminent domain is "inherent in the state, it is an attribute of sovereignty resting upon political necessity, and as essential to the effective existence of the state as the police power and power of taxation." 19 N.Y. Juris, supra, at §4, p. 193. Accord, Georgia v. Chattanooga, 264 U.S. 472, 480 (1924). The power of eminent domain "is not a property right or an exercise by the state of an ultimate ownership of the soil, but...is based on the sovereignty of the state." 26 Am. Jur. § 3 pp. 641-42 (1966).

Owners whose property is acquired by New York under its power of eminent domain are entitled to just compensation by virtue of Article 1, Section 7 of the State Constitution and by the 5th Amendment to the federal Constitution as applied to the states through the Fourteenth Amendment, Penn Central Transp. Co. v.

New York City, 438 U.S. 104, 123-28 (1978). In such cases, both constitutions reqire payment of just compensation for the appropriated property and the question of sovereign immunity is of no consequence to the state's liability. Keystone Assoc. v. State of New York, 39 A.D. 2d 176, 333 N.Y.S. 2d 27, 28 (3d Dept. 1972), aff'd on opinion below, 33 N.Y. 2d 848, 352 N.Y.S. 2d 194 (1973). By comparison, where New York takes property under its police power, such as where it legislates zoning or provides the machinery to enjoin noxious use, there is no right to compensation by the affected owner. Lutheran Church in America v. City of New York, 35 N.Y. 2d 121, 129, 359 N.Y.S. 2d 7, 14, 316 N.E. 2d 305, 310 (1974); Lemp v. Town Board of Islip, supra, 394 N.Y.S. 2d at 521. Accord, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).*/

In the case at bar, it is of no consequence whether New York's taking of Beechcraft's leasehold interest at Republic (as suggested by the State itself) is a taking under New York's police power or its power of eminent domain. If the de facto taking is pursuant to the State's police power, then under the cited authorities, no compensation is required. If, on the other hand, the taking is under New York's power of eminent domain, controlling state law discussed below prohibits Beechcraft from recovering for lost business revenues and customer good will.

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*/ See generally, Fred F. French Inv. Co., Inc. v. City of New York, 39 N.Y. 2d 587, 385 N.Y.S. 2d 5, 350 N.E. 381, cert. denied, 429 U.S. 990 (1976). But see, Loretto v. Teleprompter Manhattan CATV Corp., 50 U.S.L.W. 4988 (June 30, 1982) (physical intrusion upon real property under state's police power constitutes a compensable taking).

In the absence of a specific statutory provision to the contrary, New York law prohibits both an owner of appropriated property, or a lessee holding a leesehold interest in the property, from recovering against the State for the "loss of business profits" or for the loss of customer "good will." 19 N.Y. Jur. Eminent Domain §187 p. 424, §233 p. 478; Bopp v. State, 19 N.Y. 2d 368, 280 N.Y.S. 2d 135, 227 N.E. 2d 37 (1967); Re New York, W.S. & B.R. Co., 42 Sup. Ct. 633, 35 Hun. 633 (5th Dept. 1885).*/ New York's law on this point is the prevailing view. 27 Am Jur 2d, Eminent Domain §353, p. 198; United States v. General Motors Corp., 323 U.S. 373 (1945); United States v. Petty Motor Co., 327 U.S. 372 (1946). The rationale for this result is that the loss of business, profits, or good will is not land or real estate in the constitutional sense and, thus, not subject to just compensation under considerations of eminent domain. See generally, Newark v. Cook, 99 N.J. Eq. 527, 537, 133 A. 875, 879 (1926), aff'd without opin., 100 N.J. Eq. 582, 135 A. 915, cert. denied, McEuey v. Newark, 274 U.S. 757 (1927).

New York does nothing more in its brief than hypothesize that Beechcraft may have an implied de facto appropriation theory for the alleged loss of business revenues. Indeed, New York could not

*/ Accord, Strong v. State, 38 A.D. 241, 328 N.Y.S. 2d 913 (3d Dept. 1972); Garfield Homes, Inc. v. State of New York, 44 Misc. 2d 738, 255 N.Y.S. 2d 16, 24 (Ct. Cl.), aff'd sub nom., Great Atlantic & Pac. Tea Co. v. State, 25 A.D. 2d 905, 269 N.Y.S. 2d 487 (3d Dept.), modified, 22 N.Y. 2d 75, 291 N.Y.S. 2d 299, 238 N.E. 2d 705 (1968). See generally, 53 Cornell L. Rev. 604, 627, et seq. (1968).

suggest any actual taking of real property per se since the record below does not reflect such an event. The State is thus defeated by its own law which prohbits recovery for the loss of business profits occasioned by a taking of property under the power of eminent domain.

The State places heavy reliance in its brief on Keystone Assoc. v. State of New York, supra. Yet Keystone stands for no more than the well-recognized rule that a state which takes property under its power of eminent domain, whether by statute or by administrative process, must pay just compensation to those having an interest in the property. The United States takes no issue with this fundamental constitutional principle.

It is the position of the United States, and of the court below, that when New York injures a private party through the passage of an unconstitutional law not appropriating real property, the State has not waived its immunity from monetary liability. Such was the holding of the Court of Claims in Fonfa v. State, supra. No dicta in Keystone or in any other authority cited by the State gainsays this result.

The State attempts to discount the importance of Fonfa at pages 24 and 25 of its brief by arguing that the district court acted illogically in not following the "analytical framework used by the Fonfa Court." New York argues that after recognizing that "the passage of legislation is an act only performed by the sovereign," the lower court failed to consider "whether the enactment of the curfew was undertaken by the State in a sovereign capacity or was rather the action of a proprietor which incidentally is

also a sovereign." State's brief at 24. The illogic, however, lies not with the district court's reasoning, but with that of the State. The State suggests only two possible causes of action that Beechcraft could bring against it for money damages, i.e., breach of contract and de facto appropriation. Yet neither has anything to do with the State acting in a proprietary capacity. The power to make contracts is not an aspect of property law, and the power of a state to acquire property by virtue of its police power or its power of eminent domain is exclusively sovereign in character and not proprietary. 26 Am. Jur. 2d (1966) §3 pp. 641-42. Insofar as New York contends that the imposition of a curfew can support a breach of contract or a de facto taking claim, it is a non sequitur to talk in terms of the State imposing a curfew in its capacity as a proprietor.

The State's reliance on Drake v. State of New York, 97 Misc. 2d 1015, 416 N.Y.S. 2d 734 (Ct. Cl. 1979), aff'd, 75 App. Div. 2d 1016, 432 N.Y.S. 2d 676 (4th Dept. 1980), fails to clarify the ambiguity of its argument on this point. At issue in Drake was whether the State, as the owner of park land, owed a duty of care to protect users of the park from ambush by indians illegally occupying the land. The suit was one for tortious conduct, not for breach of contract or for de facto taking.

Indeed, even if the State could construct a cause of action that Beechcraft might bring based upon the curfew being the improper action of the State in its role as airport proprietor, the case would fail. As noted earlier, both Beechcraft and the

United States contend that the Contact Clause of the Constitution renders New York's efforts to take over ownership of Republic Airport void ab initio. Poindexter v. Greenhow, 114 U.S. 270, 288 (1884). A cause of action pitched on the State's conduct as owner of Republic, therefore, fails at the start.*/

The conclusion reached by the lower court that Beechcraft's lawsuit is exclusively one about business injury caused by an unconstitutional state law is undeniably correct. Under the Court of Claims analysis of its jurisdiction in Fonfa, supra, and cited authorities, the lower court was correct in concluding that Beechcraft has no remedy at law against the State for money damages. The district court's finding of irreparable injury was thus proper and should not be set aside.

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*/ The court below did not reach Beechcraft's Contract Clause argument preferring, instead, to limit its analysis to Supremacy Clause issues. United States v. State of New York, supra, 552 F. Supp. at 262-63, J.A. 215. The district court did, however, decide adversely to Beechcraft the issue of whether New York was acting in its police power capacity or its proprietary capacity when enacting the curfew into law. Beechcraft had urged that New York was only acting under its police power role. The district court concluded that New York acted simultaneously under both capacities. 552 F. Supp. at 264, J.A. 218-19. The lower court's ruling only goes to the power relied upon by the State to pass the challenged legislation. It does not reach the question of whether the end result of using that power was denied by virtue of the Contract Clause.

Insofar as the State seeks to rely on the lower court's ruling, New York must concede that its suggested de facto taking cause of action lacks merit since such an action must be predicated on the assumption that the State acted under its power of eminent domain. The district court, however, found only that New York acted under its police and propietary powers.

III. HAVING FOUND THAT BEECHCRAFT HAD NO REMEDY AT LAW AGAINST NEW YORK, THE LOWER COURT CORRECTLY FOUND THAT BEECHCRAFT HAD SHOWN IRREPARABLE INJURY.

A. The Absence Of A Legal Remedy For Money Damages Constitutes Irreparable Injury.

Assuming Beechcraft was indeed without a legal remedy for damages against New York, the State argues in the alternative that the lower court erred in concluding that Beechcraft had also satisfied the irreparable injury prong of the test for preliminary injunctive relief simply because it could not recover damages from the State. The district court's action, however, of merging the concept of an adequate remedy at law with that of irreparable injury was proper under the circumstances of this case and is not a ground for reversal.

New York correctly observes that long-standing Supreme Court precedent on the granting of injunctive relief requires the existence of "irreparable harm and the inadequacy of legal remedies," Beacon Theatries v. Westover, 359 U.S. 500, 506-507 (1959). The United States also does not take issue with New York's characterization of the lower court's ruling as one which implicitly found both considerations satisfied once it concluded that the Eleventh Amendment barred a monetary recovery by Beechcraft. The State errs, however, when it contends that the lower court was wrong to undertake this merger. State's brief at 28.

Irreparable injury in the context of a preliminary injunction is injury which will occur before the trial court can render judgment on the grant of a permanent injunction and which cannot later be remedied by an action at law. Thus in a suit against the State of Louisiana to enjoin the imposition of an oil tax, the Supreme Court found that plaintiff's inability to recoup payments pendente lite of the disputed tax from the State, constituted grounds for a preliminary injunction and, thus, a showing of irreparable injury. Ohio Oil Co. v. Conway, 279 U.S. 813 (1929). Relying on Ohio Oil, the United States District Court for the Northern District of Alabama has noted in Int'l Assn. of Firefighters v. City of Sylacauga, 436 F. Supp. 482, 492 (N.D. Ala. 1977):

> It is well settled that a federal court should not issue an injunction unless there is both irreparable injury and lack of an adequate remedy at law. If an injury cannot be adequately remedied at law, because damages would be either inadequate or unascertainable the injury is generally held irreparable. Thus, the requirements of irreparable injury and lack of adequate legal remedy merge.

(Citations omitted.) (Emphasis added.) The appropriateness of merging the requisites of an adequate remedy at law with irreparable injury has been favorably noted by former Judge Mulligan of this Court in a law review article on preliminary injunctions in

the Second Circuit.*/ 43 Brooklyn L.Rev. 831, 838 (1977). In his treatment of the matter, he cited with approval the following dicta of the United States District Court for the Northern District of Texas in Mesa Petro. Co. v. Aztec Oil & Gas Co., 406 F. Supp. 910, 913 (N.D. Tex. 1976):

> There is a great overlap among these standards [for preliminary injunctive relief] partly concealed by their seriatim listing. And with irreparable injury the overlap may be almost complete at least as to the 'adequacy of the remedy at law'... If, for example, money damages can make the applicant whole, the remedy at law is adequate and the injury is not irreparable.

In the case at bar, Beechcraft cannot be made whole for its anticipated damages because of the Eleventh Amendment. On the precedent of the foregoing authorities, it was correct for the district court to conclude that Beechcraft had satisfied the requisite showing of irreparable injury in light of its inadequate legal remedy.

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*/ The theme of Judge Mulligan's article was that the requisite of irreparable injury should be satisfied before injunctive relief is granted notwithstanding the possible inference from Sonesta Hotels Corp. v. Wellington Assoc., 483 F.2d 247 (2d Cir. 1973), that the Second Circuit had abandoned the requirement. The Circuit subsequently made clear that irreparable injury is, indeed, a mandatory requisite for injunctive relief. See, Sperry Int'l Trade v. Gov't of Israel, 670 F.2d 8, 11 (2d Cir. 1982).

The State argues that under such a result, one dollar in damages would satisfy the requirement of irreparable injury. The short answer to this contention is that one dollar would likely not qualify as a real harm in the sense the word is used in measuring the need for injunctive relief. And even if it were to qualify, the normal balancing of equitable factors would proportionately reduce the significance of the irreparable injury standard in the overall equation of relief. As noted also by the court in Mesa Petroleum, supra, and cited with approval by former Judge Mulligan,

> the courts have added as a measure, the 'balancing of equities.' This is probably no more than another means of expressing an ultimate conclusion that, all things considered, the final determined relief is proper.

406 F. Supp. at 913. As will be noted in the next section of this argument, Beechcraft's injury as measured by New York is on the order of $300,000, and as measured by Beechcraft, on the order of many millions of dollars. The plaintiff's irreparable injury under either standard is substantial.

New York also attacks the lower court's merger of the related standards for equitable relief as turning "the Eleventh Amendment on its head." State's brief at 31. The State argues that since Beechcraft cannot sue the State for damages, it has no compensable injury which it can label as irreparable harm for purposes of securing injunctive relief. The argument falls of its own weight.

The fact that Beechcraft cannot sue New York for damages resulting from the Republic curfew is what makes Beechcraft's injury irreparable. The fact that the Eleventh Amendment is the causation of the inadequate legal remedy is irrelevant. Such was precisely the point made by the Supreme Court in Ohio Oil Co. v. Conway, supra, where the Court noted in the context of an analogous Eleventh Amendment setting:

> If the tax be paid during the pendency of the suit, and the statute be adjudged invalid by the final decree, the plaintiff will be remediless. The laws of the State afford no remedy whereby restitution of the money so paid may be enforced, even where the payment is under both protest and compulsion.*/

279 U.S. at 815. The Court concluded that the State's immunity from suit gave rise to plaintiff's entitlement to a preliminary injunction.

More recently, the Court has had occasion to observe in the context of a civil rights action against a state and its officers that a state's "immunity from damages does not ordinarily bar equitable relief as well." Wood v. Strickland, 420 U.S. 308,

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*/ The Court's emphasis on the absence of an adequate legal remedy in state court as opposed to federal court appears misplaced in light of its later holding in DiGiovanni v. Camden Fire Insurance Ass'n, 296 U.S. 64, 69 (1935). See discussion supra at pp. 21-22. Regardless of whether DiGrovanni would require emphasis on the adequacy, vel non, of an adequate legal remedy in federal court, the same result obtains that the State's immunity from suit for the recoupment of money was not only not a defense to a preliminary injunction, but instead was the reason to issue one.

314 n. 6, reh. denied, 421 U.S. 921 (1975). Accord, Tayyari v. New Mexico State Union, 495 F. Supp. 1365, 1370 (D.N. Mex. 1980).

New York's argument appears to confuse the appropriateness of granting injunctive relief against states which seek to expend funds from the State's treasury, In re Ayers, 123 U.S. 443 (1887), with those that do not, Ex Parte Young, 209 U.S. 123 (1908). The latter type of injunction is not barred by the Eleventh Amendment. See generally, Edelman v. Jordan, 415 U.S. 651 (1974).

The preliminary injunction at issue in this appeal is prohibitory in nature; it restrains New York and its officers from implementing a state law banning nighttime flights at an airport. Insofar as the State has decided, regardless of the litigation, to leave runway lighting, navigational equipment, and crash-fire-rescue services in operation throughout the night,*/ permitting planes to use the airport at night will not cause the increased expenditure of state revenues.**/ The State does not contend the contrary. As a result, enjoining the curfew will neither offend the Eleventh Amendment, nor as the State contends,

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*/ Dfnds' Mem of Law In Opposition To The Proposed Intervenor's Motion For A Preliminary Injunction, p. 25 n.(*), filed Sept. 30, 1982.

**/ Even if modest expenditures incidental to the injunction occurred, they would not render the relief fatal under the Eleventh Amendment. Edelman v. Jordon, supra, 415 U.S. at 667.

require it to "surrender the very immunity guaranteed by the Eleventh Amendment." State's brief at 32.*/

B. Assuming A Legal Remedy Exists For Beechcraft, It Would Not Be Adequate

Even assuming Beechcraft could sue New York for business revenues lost as a result of the State's curfew, the remedy would not be adequate to compensate the plaintiff both because New York's actions violate important constitutional rights and because lost revenues and accompanying good will are too difficult to measure.

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*/ The State's reliance on DiGiovanni v. Camden Fire Insurance Assoc., supra, is also of no assistance. At issue in the case was whether, for purposes of exercising a federal court's equity jurisdiction, a party seeking injunctive relief could demonstrate the inadequacy of a legal remedy in federal court on the ground that the court lacked subject matter jurisdiction over the legal cause of action. The Supreme court said no, noting that the "want of the jurisdictional amount in controversy which deprives a federal court of its authority to act at law is not ground for invoking its equity jurisdiction." Id. at 69-70. This result has no bearing on whether a state's immunity from monetary liability defeats a claim for injunctive relief since, as noted supra, a state's immunity is no defense to an injunction which does not seek the expenditure of revenues from its fisc. As the Court noted in Di Giovanni, "whether a suetor is entitled to equitable relief in federal courts... is strictly not a question of jurisdiction in the sense of the power of a federal court to act." 296 U.S. at 69.

The court below undeniably had the power to enjoin New York's curfew, and Beechcraft's showing of no adequate legal remedy coupled with the showing of likely success on the merits was the justification for exercising that power.

1. Constitutional Injury

As noted earlier, the entire substance of each plaintiff's case against New York, including Beechcraft's, is that the State has acted unconstitutionally in its efforts to take over Republic Airport and impose a nighttime curfew. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." Wright & Miller, Federal Practice and Procedure, §2948, p. 440; Planned Parenthood v. Citizens for Com. Action, 558 F.2d 861, 867 (8th Cir. 1977); A Quaker Action Group v. Hickel, 421 F.2d 1111, 1116 (D.C. Cir. 1969); Keefe v. Geanakos, 418 F.2d 359, 363 (1st Cir. 1969). And when a person clearly establishes by undisputed evidence that he is being denied a constitutional right, a "district court has no discretion to deny relief by preliminary injunction." Henry v. Greenville, 284 F.2d 631, 633 (4th Cir. 1960). See generally, Battle v. Municipal Housing Authority for the City of Yonkers, 53 F.R.D. 423 (S.D. N.Y. 1971); Lollis v. New York State Dep't of Social Services, 322 F. Supp. 473, 483 (S.D. N.Y. 1970). While a bare allegation of unconstitutional conduct alone does not demand a finding of irreparable injury, certainly a finding of unconstitutional conduct does.

Such is the situation in the case at bar where the lower court affirmatively found unconstitutional conduct by New York. In considering Beechcraft's contention that the curfew constituted unconstitutional conduct preempted by Congress for the FAA and thus violative of the Supremacy Clause, the district court held:

> Here, the Court finds that Article 15's curfew is overbroad, unreasonable and arbitrary.
>
> ** ** **
>
> ...the curfew provision of Article 15 is overbroad and constitutionally impermissible in view of federal pre-emption of regulations concerning noise and planes in flight.

552 F. Supp. at 265, J.A. 220-21.

This action stands at a point far advanced from the pleadings stage where only accusations of unconstitutional conduct are found. A full record based on adversarial affidavits, and conflicting federal and state statutory requirements was before the court at the time it reached its finding of unconstitutional conduct.*/

*/ New York argues that to the extent the lower court agreed with Beechcraft's claims of significant financial losses, the State should have been granted an evidentiary hearing to dispute the claims. State's brief at 41 n.(*). The State, however, never requested a hearing on Beechcraft's motion for a preliminary injunction. It was only in the context of its motion for reconsideration that New York asked for a hearing.

It is the law of this Circuit that if a party who resists a preliminary injunction "is unwilling to have the issuance of a temporary injunction decided on affidavits, he must make his objection known; he may not gamble on the judge's accepting his affidavits rather than his adversary's and then seek a reversal if the result is disappointing." Sec v. Frank, 388 F.2d 486, 493 n.6 (2d Cir. 1968) (emphasis added); accord, Jacobson & Co., Inc. v. Armstrong Cork Co., supra, 548 F.2d at 442. New York did not object to the lower court's original resolution of Beechcraft's motion for a preliminary injunction on affidavits. On the contrary, it placed strong reliance on the affidavit of its own witness, Clarence Cook, Director of the Aviation Bureau of the State Department of Transportation. That New York gambled and lost is not sufficient ground to retry the same fact contentions with live testimony.

Additionally, the benefits of live testimony have been adequately subserved by the State's deposition of Beechcraft's Vice President submitted by the State as an exhibit of record. Such has been found by this Court to militate against the need for an evidentiary hearing in the context of a preliminary injunction contest. Armstrong Cork, ibid.

New York does not appeal this finding. The record remains unchallenged that all plaintiffs, including Beechcraft, have been denied important constitutional protections. On the basis of the cited authorities, it would have been correct for the district court to have found the existence of irreparable injury even if Beechcraft had an ultimate legal remedy against New York for damages.

2. Financial Injury

It would also have been correct for the lower court to have found irreparable injury solely on the basis of the magnitude of Beechcraft's anticipated financial losses.

Contrary to defendants' contention at page 36 of their brief, a corporation which seeks preliminary injunctive relief in the Second Circuit need not show the prospect of certain bankruptcy to satisfy this Court's requisite of irreparable injury. It is enough to show loss of significant business opportunities, Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197 (2d Cir. 1970); loss of customer good will, Jacobson & Col, Inc. v. Armstrong Corp. Co., 548 F.2d 438 (2d Cir. 1977); or public confusion over a product's owner, Warner Bros., Inc. v. Gay Toys, Inc., 658 F.2d 76 (2d Cir. 1981).

While the United States defers to Beechcraft to discuss more fully the specific nature of irreparable harm it will suffer from New York's imposition of a blanket curfew at Republic, the government does note that the undisputed record places Beechcraft's projected losses from the curfew at an amount far in excess of the $300,000 claimed by the State. State's Brief at 38.

The November 12, 1982 affidavit of Beechcraft's Vice President, Allen K. Pepin, J.A. 405, points out that the State erroneously places excessive emphasis on revenues derived from tenant customers for hanger and tie-down service. Pepin affd't ¶ 3, J.A. 406. He states that the "imposition of a curfew at Republic Airport would have a domino effect upon Beechcraft East, Inc.'s business (of selling aircraft)," ibid, since potential customers for the purchase of aircraft are those who are satisfied tenants in residence at Republic. Pepin affdv't ¶4, J.A. 406. A curfew will cost Beechcraft the loss of many of these tenants who will move their planes to airports open at night, 552 F. Supp. at 261, J.A. 210-212. Mr. Pepin testifies that in light of the serious downturn in the aircraft industry due to the recession (as evidenced in part by the company's current operating deficit), lost aircraft sales resulting from the curfew will require the plaintiff "to discontinue its operation at Republic Airport." Pepin affdv't ¶¶ 8 & 9, J.A. 407-08.

To lose customers, and ultimately a business, means far more than dollars and cents. It means frustration, loss of self-esteem, and doubt in the legitimacy of the free enterprise system. Mr. Pepin's testimony serves as the best evidence of this point:

> Q. Now, the point of this paragraph, was to demonstrate that if the curfew goes into effect, your business is going to be severely impacted in terms of the current amount of money that you already expended, is that right?

A. Yes, that is correct.

Q. For the fuel trucks that you purchased, could you sell those trucks?

A. Well, everything could be sold. The question is, I don't want to sell the fuel trucks. I want to put fuel in the customer's airplanes, for which I bought it. And, I will never get my money out of it.

Dep. tr. at p. 39B (emphasis added). As this Court has noted in Semmes Motors, Inc. v. Ford Motor Co., supra, 429 F.2d at 1205:

> But the right to continue a business in which [plaintiff] had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; [plaintiff] wants to sell automobiles, not to live on the income from a damages award.

(Emphasis added).

Beechcraft's showing of irreparable economic harm has not been successfully countered by the State's discovery. Even assuming the waiver of immunity by the State, such would not constitute an adequate remedy at law for Beechcraft. Under these circumstances, it would have been proper for the district court to have found a showing of irreparable injury even if an ultimate damages remedy had existed.

CONCLUSION

The preliminary injunction issued by the lower court enjoining unconstitutional state conduct was providently granted and should not be set aside on this appeal.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 82-6343

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-and-

BEECHCRAFT EAST, INC.,

Intervenor-Plaintiff-Appellee,

-against-

THE STATE OF NEW YORK; and WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,

Defendant-Appellants.

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Plaintiff-Appellee,

-against-

WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 1983, copies of the United States' Brief as Plaintiff-Appellee were served on

all parties of record by mailing two copies thereof, postage prepaid, to the following counsel of record:

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Office - Supreme Court, U.S.
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CLERK

NO. 83-663

IN THE

Supreme Court of the United States

October Term, 1983

THE STATE OF NEW YORK; and JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioners,

—against—

THE UNITED STATES OF AMERICA,

Respondent,

and

BEECHCRAFT EAST, INC.,

Respondent.

JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

—against—

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BEECHCRAFT EAST, INC.

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BRIEF FOR BEECHCRAFT EAST, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-6a) is reported at 708 F.2d 92. The opinion of the District Court (Pet. App. 9a-30a) is reported at 552 F.Supp. 255.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1983 (Pet. App. 33a-34a). A petition for rehearing was denied on July 21, 1983 (Pet. App. 35a-36a). The petition for a writ of

certiorari was filed on October 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On June 23, 1982, the New York State Legislature enacted a statute which purports to: (1) divest Metropolitan Transportation Authority (MTA) of its ownership of Republic Airport (Republic), located in Suffolk County, New York, (2) vest ownership and operational responsibilities over Republic in the State's Department of Transportation (DOT), (3) impose a mandatory 11:00 p.m. to 7:00 a.m. blanket curfew at Republic, except for emergency use, and (4) vest exclusively in a citizen's commission (Republic Airport Commission) the power to modify the curfew after notice and hearing. Pet. App. 16a-18a.

On September 17, 1982, the United States commenced an action against the State of New York (State) and its Commissioner of Transportation to have the Court declare unconstitutional those portions of the State law which purports to transfer ownership of Republic to New York State and which imposed a blanket prohibition on the use of the airport, except in case of emergency, between the hours of 11:00 p.m. and 7:00 a.m. The United States challenged the statute, on the basis of the contract clause, Article I, Section 10, the Supremacy Clause, Article VI, Clause 1, and the Commerce Clause, Article I, Section 8, cl. 3 of the United States Constitution. Pet. App. 10a-11a, 18a.

Beechcraft East, Inc. (Beechcraft) is a corporation organized and existing under the laws of the State of Kansas and maintains its principal office at Republic. On October 1, 1972, Beechcraft and MTA entered into an agreement whereby MTA leased to Beechcraft certain land and facilities at Republic for the purpose of conducting a general aviation facility to provide, among other

things, all aviation related services as well as the sale, purchase, rental and lease of aircraft. As a result of that agreement, Beechcraft has expended large sums of money in the development of its general aviation facility, purchased properties and equipment necessary to perform its obligations pursuant to the agreement, and has entered into agreements with owners and lessees of aircraft, based at Republic, wherein Beechcraft has agreed to provide twenty-four hour service and flights on demand, as well as cargo transfer and emergency medical flights.

On September 22, 1982, Beechcraft made a motion in the United States District Court for the Northern District for a preliminary injunction against the curfew, pending the trial and determination of the action and for leave to intervene in the action commenced by the United States. Beechcraft alleged that as a result of the blanket curfew twenty-seven (27) of its customers gave notice of their intention to cancel their agreements with Beechcraft and relocate to other airports. In support of its motion Beechcraft filed its complaint, affidavit of Allen K. Pepin, Beechcraft's Vice President and General Manager, affidavit of James J. von Oiste, Beechcraft's attorney, and the twenty-seven (27) letters of cancellation from its customers. Pet. App. 19a, 21a-22a.

The State did not request an evidentiary hearing nor did it complain or object, formally or otherwise, to have the issuance of the preliminary injunction decided on affidavits and argument of counsel.

In opposition to Beechcraft's motion for the preliminary injunction the State submitted the affidavit of Clarence Cook, Director of the Aviation Bureau of the Division of Highways, Aviation, and Ports of New York State.

Beechcraft's motion was returnable on October 1, 1982. After

hearing argument of counsel, in open court, both for and against the motion, the District Court found that Beechcraft had sustained its burden with respect to its application and granted the motion.

In a Memorandum-Decision and Order, dated October 14, 1982, the District Court granted the preliminary injunction. With respect to the likelihood of success on the merits, the court concluded that the curfew conflicted with federal law governing aviation and therefore was invalid under the Supremacy Clause. Pet. App. 23a-30a. In addition, the court found that Beechcraft would suffer an "'actual and imminent'" business loss as a result of the curfew (id. at 22a) (citation omitted) and had no adequate remedy at law because the Eleventh Amendment "precludes Beechcraft from obtaining compensatory damages here" Pet. App. 22a n.9. Following discovery, the State moved for an Order vacating the District Court's Order of preliminary injunction, or, alternatively, setting down a date for the court to conduct an evidentiary hearing. The State did not contend that the lower court erred in determining a likelihood that Beechcraft would succeed on the merits. Instead, the State limited its motion to the sole contention that insofar as Beechcraft suffers economic loss from the blanket curfew, it has an adequate remedy at law pursuant to Section 8 and 9(2) of the New York Court of Claims Act.

The court of appeals affirmed the preliminary injunction, Pet. App. 1a-6a. Petitioners did not challenge Beechcraft's showing of a likelihood of success on the merits, and instead limited the appeal to the issue of irreparable injury. The court of appeals rejected petitioner's argument that state law furnished an adequate legal remedy, holding that "in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available federal legal remedies" (id. at 4a).

REASONS WHY THE WRIT SHOULD BE DENIED

LACK OF AN ADEQUATE REMEDY AT LAW IN THE FEDERAL COURT WAS SUFFICIENT TO JUSTIFY INJUNCTIVE RELIEF.

Petitioners contend that Beechcraft had an adequate remedy at law in The Court of Claims of the State of New York and that the District Court of the United States, sitting in equity, was therefore without jurisdiction.[1] This is an incorrect view of the equity jurisdiction of the District Court and was properly rejected by the Court of Appeals for the Second Circuit.

It is well settled that an adquate remedy at law, as a bar to equitable relief in the federal courts, refers to a remedy on the law side of the federal courts not the state courts. *Petroleum Exploration, Inc. v. Commissioner*, 304 U.S. 209, 217 (1938); *Di Giovanni v. Camden Insurance Association*, 296 U.S. 64, 69 (1935); *Henrietta Mills v. Rutherford County*, 281 U.S. 121, 126 (1930); *Risty v. Chicago, Rock Island & Pacific Railway Company*, 270 U.S. 378, 388 (1936).

After finding an inadequacy of remedy on the law side of its court, because the Eleventh Amendment bars suits for damages by private plaintiffs against a state in federal court, the District Court correctly applied the well established principles and rules of equity and granted Beechcraft's motion for a preliminary injunction.

[1]It was Beechcraft's contention that even if it could sue New York in the State Court of Claims, its remedy would not be adquate because Beechcraft's damages were continuing and unless the State's curfew was enjoined Beechcraft's business would be destroyed. Beechcraft also argued that since this was an action based solely upon the unconstitutional act of the New York State Legislature acting in its sovereign capacity, the Court of Claims of the State of New York would not have jurisdiction of the subject matter of the action.

The cases relied upon by the petitioners are clearly distinguishable from this case. This Court has long recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily, restrain state officers from collecting state taxes where state law affords an adequate remedy to the tax payer. *Matthews v. Rodgers*, 284 U.S. 521 (1932). Nor will this Court interfere with an ongoing state criminal proceeding. *Younger v. Harris*, 401 U.S. 37 (1971). This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts, or of the settled rule that the measure of inadequacy of the plaintiff's legal remedy is the legal remedy afforded by the federal not the state courts. *Stratton v. St. Louis S.W. Ry Co.*, 284 U.S. 530, 533-34 (1932); *Di Giovanni v. Camden Insurance Association*, 296 U.S. 64, 69 (1935); On the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as at law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest, should stay its hand in the public interest when it reasonably appears that private interests will not suffer. See *Pennsylvania v. Williams*, 294 U.S. 176, 187 (1935) and cases cited.

The issuance of the preliminary injunction was in the District Court's discretion. *Doran v. Salem, Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *Tribwasser & Katz v. American Tel. & Tel. Co.*, 535 F.2d 1358 (2d Cir. 1976); *S.C.M. Corp. v. Xerox Corp.*, 567 F.2d 358, 360 (2d Cir. 1974); *7 J Moore Federal Practice Sec.* 65:04 (2) at 65-47-49 (2d ed 1975).

The District Court was not compelled to grant injunctive relief

solely because the Eleventh Amendment barred Beechcraft's recovery of monetary damages against the State. On the basis of the pleadings, argument of counsel, exhibits and affidavits of the parties, the District Court found that Beechcraft had "demonstrated a business loss that is certainly 'not remote or speculative, but [is] actual and imminent' " (Pet. App. 22a), and that Beechcraft had no remedy at law against the State, in federal court, because of the Eleventh Amendment bar (Pet. App. 21a-22a).[2] The State did not request an evidentiary hearing nor did the State object, formerly or otherwise, to have the issuance of the preliminary injunction decided on affidavits and argument of counsel. Where, as here, the District Court had the benefit of so complete a record and the State failed to request a hearing, the State cannot argue that the District Court abused its discretion in granting injunctive relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2]As of September 11, 1982, the date of Beechcraft's motion for the preliminary injunction, twenty-seven (27) customers gave notice of their intention to cancel their agreements with Beechcraft. As of October 1, 1982, the date when Beechcraft's motion was heard, an additional sixteen (16) cancellations were received. The District Court found "that cancellations continue to be received by Beechcraft on an almost daily basis". The Court noted "There is no requirement in this Circuit that a party wait until near-extinction before moving for a preliminary injunction. The law, like the Constitution, is not a suicide pact."

No. 83-663

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1983

THE STATE OF NEW YORK and JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent,

and

BEECHCRAFT EAST, INC.,

Respondent.

JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

against

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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A. The Eleventh Amendment Cannot Be The Source Of A Federal Court's Finding Of Inadequacy Of Remedy Or Of Irreparable Injury In A Preliminary Injunction Proceeding.

Respondent the United States of America, like the court below, asserts that the Eleventh Amendment caused respondent Beechcraft East, Inc. ("Beechcraft") to have inadequate "federal remedies at law" and concludes that Beechcraft was entitled "to invoke the equitable powers of the court" regardless of the nature or extent of Beechcraft's alleged irreparable injury. *Compare* Brief For The United States In Opposition ("brief") at 7 *with* App. A at 3a-5a.* The United States repeats (brief at 7 & n.3, 10) two errors of the lower court: (1) the failure to observe that the Eleventh Amendment continues to protect a state even though a state officer has been sued for injunctive relief; and (2) the improper use of the Eleventh Amendment as the source of Beechcraft's alleged inadequate remedy and irreparable injury. The United States also makes two new errors. It mischaracterizes the record by suggesting that Beechcraft suffered an exceptional monetary loss amounting to irreparable harm. Brief at 7 & n.3. It further proposes a "balance of hardships" test which the lower courts did not apply and could not have reached given Beechcraft's inadequate showing of irreparable injury. *Id.* at 9. Last, the United States makes the irrelevant observation that if it had moved for a preliminary injunction, the Eleventh Amendment issues presented by the petition would not exist. *Id.* at 10 & n.5.

* References preceded by "App." identify the lettered appendix and page(s) of the appendices to the petition for a writ of certiorari.

Contrary to the conclusion of the United States and the lower court, the Eleventh Amendment protection afforded to the State of New York (the "State") and the Commissioner of its Department of Transportation continues even after federal jurisdiction is established under *Ex Parte Young*, 209 U.S. 123 (1908). *See* petition at 15. The Court's recent decision in *Pennhurst State School and Hosp.* v. *Halderman*, 52 U.S.L.W. 4155 (Sup. Ct. January 23, 1984), highlights this established principle. "A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Id.* at 4164. Money claims against a state officer are among those that a federal court cannot hear despite the court's jurisdiction over the officer. *Edelman* v. *Jordan*, 415 U.S. 651 (1974). When the United States and the lower court rely on the Eleventh Amendment as the authority for Beechcraft's preliminary injunction, they turn the Amendment's continuing protection into an affirmative source of rights in equity. The transformation opposes the entire body of Eleventh Amendment precedent and impermissibly coerces the State's waiver of its immunity to avoid the injunction against its officer. *Pennhurst, supra* at 4157-4158; *see* petition at 13-16.

The United States' purported distinction of *DiGiovanni* v. *Camden Fire Insurance Ass'n*, 296 U.S. 64 (1935), also fails because it does not acknowledge that the same considerations which there compelled the Court to deny equitable jurisdiction, here should have counselled the court to deny equitable relief as a matter of discretion. *See* brief at 7 & n.3. After the merger of law and equity, "the familiar rules of equity remain . . ." and federal courts "refuse equitable relief in cases in which they formerly denied jurisdiction . . . ." 1 POMEROY'S EQUITY JURISPRUDENCE

§ 295, at 768 (5th ed. 1941). *Stainback* v. *Mo Hock Ke Lo Po*, 336 U.S. 368, 382 & n.26 (1949). As the *DiGiovanni* movant's reliance on a statutory bar to support its request in equity contradicted "the express prohibition of Congress", *DiGiovanni*, 296 U.S. at 70, Beechcraft's reliance on the Eleventh Amendment for the same purpose contradicts an express prohibition of the Constitution. Petition at 13-14. Indeed, the constitutional dimension of the Eleventh Amendment required even greater deference than the statutory bar respected in *DiGiovanni*.

The United States additionally misreads the record (brief at 8 & n.3) when it suggests that Beechcraft's pecuniary loss was sufficiently substantial to avoid Second Circuit precedent, holding that money damage does not constitute irreparable injury. *E.g.*, *Sperry Int'l Trade, Inc.* v. *Israel*, 670 F.2d 8, 11 (2d Cir. 1982). The record permits only two possible findings about Beechcraft's claimed loss. The loss was insubstantial because "only a small percentage of Beechcraft's nation-wide and international revenue . . ." was at risk (App. C at 22a), or the Eleventh Amendment bar made the extent of Beechcraft's alleged injury irrelevant. App. A at 3a; App. C at 22a. *See also* Transcript of Proceeding on November 19, 1982 at 18, receiving petitioners' offer of proof that Beechcraft's financial health would not be threatened without an injunction and finding an evidentiary hearing unnecessary because of the Eleventh Amendment bar.

Further, the United States' proposal that the federal courts' application of a "balance of hardships" test will minimize the Eleventh Amendment damage to the State is misplaced. *See* brief at 9. The proposal would require the federal courts to engage in balancing before they have found

irreparable injury, the crucial first factor for a preliminary injunction.* It is without application in the case at bar since the lower courts did not "balance the hardships" and suggests, contrary to the record, that Beechcraft's minimal loss was sufficient to outweigh the State's interest in the enforcement of its statute. *See* discussion above at 3.

Last, the United States' observation that the State's Eleventh Amendment issue would be absent if it had sought the injunction, although accurate, is not responsive.** Brief at 10 & n.5. Here, the injunction was awarded to a private litigant against the State and its officer, and the Eleventh Amendment is directly involved.†

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* The prevailing preliminary injunction test is one followed by the Second Circuit: "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Sperry Int'l*, 670 F.2d at 11.

** The United States' observation that the State did not appeal the district court's finding of likelihood of success on the merits is also not responsive. Brief at 5. "Irreparable injury was so palpably nonexistent . . ." that the injunction's vacatur was sought on this ground alone. Court of Appeals Reply Brief for Defendants-Appellants at 3. Nevertheless, petitioners emphasized in both courts below that the merits were disputed and were simply "reserved . . . for a later day", *id.*, when the record would be complete.

† When the United States addresses the propriety of Beechcraft's suit against the State *eo nomine*, it first concedes the issue in petitioners' favor and then attempts to withdraw the concession. *Compare* brief at 9 *with id.* at 10. Petitioners agree that the "district court erred in entering the preliminary injunction against the State." *Id.* at 9. However, we depart from the United States when it concludes that this error does not also infect the injunction against the State's officer. *Id.* at 10. As discussed above, the injunction violates the Eleventh Amendment because the decree, although nominally against the State's officer, operates against the State. *See Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963). In the lower court, the State cited *In re Ayers*, 123 U.S. 443 (1887), for this well-settled proposition. The lower court regarded *Young*, 290 U.S. at 123, as having "'undermined the basis of *In re Ayers*.'" App. A at 5a. In *Pennhurst*, *supra* at 10, this Court confirmed the vitality of the *Ayers* doctrine. *See also*, *Pennhurst*, *supra* at 4170 & n.28 (*Stevens*, J., dissenting).

B. Federal Courts Must Inspect The Adequacy Of State Court Remedies When They Are Asked To Award A Preliminary Injunction.

The United States repeats another lower court mistake when it concludes that federal courts, as a general rule, only inspect the adequacy of legal remedies available in the federal, and not state, forums. *Compare* brief at 5-7 *with* App. A at 4a. Like the court of appeals, the United States disregards historic precedent decided under Section 16 of the Judiciary Act of 1789, 1 Stat. 82, and makes two exceptions to its general rule—pending state enforcement actions, the doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971), and its progeny, *e.g.*, *Trainor* v. *Hernandez*, 431 U.S. 434 (1977), and injunctions against the collection of state taxes.* Brief at 6. The exceptions actually are reflections of the correct general rule.

Hipp v. *Babin*, 60 U.S. (19 How.) 271 (1856), one of the Court's earliest decisions, illustrates the correct rule advanced by petitioners. *See* petition at 10. There the Court, relying on the maxim that federal courts should not grant equitable relief when a "plain, adequate and complete" remedy existed at law, dismissed an equitable bill seeking title to land and an accounting because a sufficient legal remedy existed in the Louisiana courts.** *Id.* at 279. *See*

* The United States and the lower court agree on one exception to their articulation of the general rule, tax injunction cases. The lower court cites state rate cases as its second exception. App. A at 4a. The United States' second exception, the *Younger* doctrine, differs.

** The maxim was codified in Section 16, *supra*, and is regarded as but declaratory of the English Chancellor's "rule in equity . . . forbid[ding] . . . recourse to the extraordinary remedy of equity where the right asserted may be fully protected at law." *Matthews* v. *Rodgers*, 284 U.S. 521, 525 (1932).

also New York Guaranty Co. v. *Memphis Water Co.*, 107 U.S. (17 Otto) 205, 213 (1882) (equitable claim on contract dismissed because remedy at law available in Tennessee courts). *See Pennsylvania* v. *Williams*, 294 U.S. 176 (1935). Almost one hundred years later, the equitable maxim applied in *Hipp, supra,* was observed in *Alabama Public Service Comm'n* v. *Southern Ry. Co.*, 341 U.S. 341, 349 (1951), where an injunction against a state order prohibiting discontinuance of railroad service was denied because of the existence of adequate state court review procedures.* The vitality of the maxim continues in modern times. Just two terms ago, the Court characterized its prior precedent on this subject as articulating "the traditional doctrine that courts of equity will stay their hand when [state] remedies at law are plain, adequate and complete." *Fair Assessment In Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 108 (1981). *See* petition at 10.

The United States' creation of two exceptions to its general rule (brief at 6) merely reaffirms petitioners' earlier stated view that the exceptions are applications of the correct general rule. The first created exception, the deference to state court remedies embodied in the *Younger* doctrine, was shown by the Court in *Hipp, supra, New York Guaranty, supra,* and *Alabama Public Service Comm'n, supra,* although no state enforcement proceedings were involved in those cases. The second created exception, tax

* Justices Frankfurter and Jackson concurred in the result, finding that no substantial federal question was presented. *Alabama Public Service Comm'n*, 341 U.S. at 355. With reasoning parallel to the United States and the lower court, the concurring Justices disagreed with the majority's view that federal courts should review the adequacy of state court remedies. *Id.* at 359. However, they expressly recognized the equity court's discretion to deny relief even where no adequate remedy at law existed in the federal court. *Id.* at 360. *See Petroleum Exploration, Inc.* v. *Commissioner*, 304 U.S. 209, 221 (1938).

injunction actions, fares no better since it has been acknowledged as a " 'notable application' ", *Fair Assessment*, 454 U.S. at 108, of the correct rule rather than as an exception. *See* petition at 11-12.

Last, the United States misperceives petitioners' "notions of federalism." Brief at 8. Petitioners and the thirty-three state *amici* do not urge, as the United States suggests, that this action be dismissed and that Beechcraft be required to litigate the merits of its federal claims in state court. Instead, we urge that Beechcraft, once it selected the federal forum, was bound by the limitations that federalism imposes on the award of preliminary injunctions. Where the State's officer is a federal court defendant, "[t]he scrupulous regard for the rightful independence of state governments . . ." requires the denial of a preliminary injunction "in every case where the asserted right may be preserved without it." *Matthews*, 284 U.S. at 525. *Accord Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 294, 297 (1943); *Singer Sewing Machine Co.* v. *Benedict*, 229 U.S. 481, 485 (1913). The State Court of Claims provides Beechcraft with a ready forum in which to assert its claim to compensatory relief.* Its choice of the federal forum could not create a

* The Court need not consider the district court's erroneous holding that the State Court of Claims is without jurisdiction unless it rejects petitioners' independent claim under the Eleventh Amendment. *See* petition at 13-16; discussion at 2-4. If the Court does reach the issue, petitioners already have demonstrated that the relevant New York statute and case law provides Beechcraft with an adequate remedy in the State Court of Claims. Petition at 7 & n.*. The United States limits its opposition on this point. It states that "there is . . . a substantial question whether state law would provide damages for injuries suffered as a result of an unconstitutional statute. Brief at 5 & n.1. In so stating, the United States at best has created a question of uncertain state law to be resolved by the state courts. *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 416 & n.7 (1964); *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 499-500 (1941).

hybrid remedy which disregards state at law relief and converts the Eleventh Amendment into a source of affirmative rights.

Conclusion

For the foregoing reasons and those set forth in the petition, review should be granted and the judgment of the court of appeals summarily reversed.

Dated: New York, New York
February 3, 1984

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IN THE

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October Term, 1983

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and

BEECHCRAFT EAST, INC.,

Respondent.

JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

against

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF FOR RESPONDENT BEECHCRAFT EAST, INC.

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ARGUMENT

Respondent Beechcraft East, Inc. ("Beechcraft") repeats two arguments offered by respondent the United States of America: first, federal equity courts may only inspect available federal remedies and second, Beechcraft's federal remedy at law is inadequate because the Eleventh Amendment forecloses monetary relief. *Compare* Brief For Respondent Beechcraft East, Inc. ("Beechcraft brief") at 5-7 *with* Brief For the United States In Opposition ("United States brief") at 5-10. Petitioners refuted these arguments in their petition and their brief in reply to the United States brief. Beechcraft also argues that the lower courts found facts in the record which establish its irreparable injury independent of the Eleventh Amendment bar. Beechcraft brief at 4-5 and 7. Here, we refute this argument which transforms the lower courts' erroneous conclusion of law—"absolute . . . irreparability" because of the Eleventh Amendment—into a finding of fact. App. A at 4a.† *See also* App. C at 22a & n.9.

1. The only evidence Beechcraft provided on the preliminary injunction motion, and which it recites to this Court, were letters from 27 customers. *See* Beechcraft brief at 3 and 7 & n.2.* These customers had contracted to use Beechcraft's services as a fixed based operator at Republic Airport and in their letters allegedly threatened to cancel their agreements with Beechcraft if the curfew were not enjoined. *Id. See* petition at 4-5. Beechcraft

† References preceded by "App." identify the letter appendix and page of the appendices to the petition.

* The difference between petitioners' reference to 25 letters (petition at 4) and Beechcraft's reference to 27 letters results from Beechcraft's count of 2 letters which are not from customers. *See* App. C at 21a & n.8.

argued, and argues here, that the letters showed that the curfew would destroy its business *pendente lite*, a demonstration required under the Second Circuit irreparable injury test. *Sperry Int'l Trade* v. *Israel*, 670 F.2d 8, 12 (2d Cir. 1982); *Buffalo Courier-Express* v. *Buffalo Evening News*, 601 F.2d 48, 58 (2d Cir. 1979). *See also* petition at 4. The district court did not accept this argument. If it made a finding on the extent of Beechcraft's damages at all, it found that Beechcraft's alleged loss was, at most, "only a small percentage of Beechcraft's nation-wide and international revenue. . . ." App. C at 22a.* The court did not make, and could not have made, any other finding of fact on the evidence submitted. Beechcraft had not alleged any facts to show how the loss of customer revenues, allegedly affected by the curfew, would have a substantial impact on its financial health. Rather, irreparable injury was held to be present as a matter of law, not fact, because of the Eleventh Amendment bar. *Id.* at n.9.

2. On the vacatur motion, the district court made no additional findings of fact. *See* Transcript Of Proceeding on November 19, 1982 ("Transcript"). Having had the benefit of discovery, petitioners showed the court that Beechcraft, as a fixed based operator, actual had 200-230 customers and that it derived a maximum of $300,000 of its $21 million total revenue from this aspect of its business. In contrast, Beechcraft's aircraft sales department accounted for $16 million, by far the largest part of its total

* The court's statement that "a party [need not] wait until near extinction before moving for a preliminary injunction" (App. C at 22a-23a) refers to this "small" loss. It is not a finding that Beechcraft faced the imminent destruction of its business and does not purport to be. *Contrast* Beechcraft brief at 5 & n.7 and 7 & n.2, and United States brief at 8 & n.3.

revenue. *See* petition at 6-7. Petitioners also offered to prove that Beechcraft was financially healthy and the court accepted that offer, characterizing it as showing that Beechcraft was not "near bankruptcy." Transcript at 18.* The court refused petitioners' request for an evidentiary hearing as irrelevant given its earlier holding that the Eleventh Amendment precluded the award of "compensatory damages" (App. C at 22a & n.9) and its new holding that the New York State Court of Claims also was without jurisdiction. *Id.* at 18-19. On appeal, Beechcraft did not contest the one possible district court finding of fact concerning the extent of its injury—"small" money loss. The court of appeals made no new finding when it affirmed the district court's order denying the vacatur motion. App. A at 3a.

3. Beechcraft's failure on its preliminary injunction motion to show any nexus between the alleged customer loss and its purported business destruction obviated the need for petitioners to request an evidentiary hearing. *Contrast* Beechcraft brief at 7. On the vacatur motion, petitioners, anticipating that Beechcraft might seek to controvert their factual proof, the result of discovery, requested an evidentiary hearing. The district court's refusal to grant petitioners' request limited the factual record to the findings made on the preliminary injunction, namely, Beechcraft's loss of 25 customers was, at best, a "small" part of its total business. App. C at 22a. The district court's determina-

* Petitioners offered to show, *inter alia*: (1) Beechcraft had retained earnings of approximately $583,000, had no long term debt and had a reserve for bonuses; (2) $3.8 million of Beechcraft's current liabilities were owed to its parent company; and (3) if Beechcraft did not realize revenues from its principal department, aircraft sales, it would fail regardless of what happened with the fixed based operation aspect of its business. Transcript at 16-18.

tion in this regard illustrates that its decision, like that of the court of appeals, depended entirely on the erroneous legal theory that the Eleventh Amendment, not the effect of the curfew on Beechcraft's business, created an injury of "absolute . . . irreparability." App. A at 4a.

Conclusion

For the foregoing reasons and those previously set forth in the petition and in the reply to the United States brief, the petition should be granted, and the judgment of the court of appeals summarily reversed.

Dated: New York, New York
March 28, 1984

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE STATE OF NEW YORK; and JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent,

and

BEECHCRAFT EAST, INC.,

Respondent.

JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

against

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Respondent.

BRIEF OF AMICI CURIAE STATE OF ILLINOIS AND THIRTY-TWO OTHER STATES ON BEHALF OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Should a federal court, in determining the propriety of preliminary injunctive relief against state officers enforcing challenged state statutes, ignore the availability of adequate state law remedies and find irreparable harm *per se*?

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BRIEF OF AMICI CURIAE STATES OF ILLINOIS, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, IDAHO, INDIANA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING ON BEHALF OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF INTEREST

This petition raises issues of fundamental importance to the ability of state governments to enforce and interpret their respective state statutes without undue interference from federal court preliminary injunctions. As thirty-three states, *amici curiae*, describe in their argument, the opinion of the Second Circuit Court of Appeals carries to an extreme the merger of law and equity, redefines the elements necessary to warrant injunctive relief, and unjustifiably intrudes upon precious precepts of federalism.

The opinion broadens the authority of federal courts to grant preliminary injunctions against state officers who enforce state statutes, and invites federal courts to disregard state adjudicatory processes and remedies. Since the Eleventh Amendment bars monetary damages against state officials in their official capacities in federal court, and the court of appeals holds that the unavailability of monetary relief in that forum establishes irreparable harm *per se*, significant traditional elements required for preliminary injunctive relief are removed. The traditional application of preliminary injunctive relief only to preserve the status quo, not overturn state statutes, is also dramatically altered. The removal of these long-standing roadblocks to preliminary injunctive relief subjects state officials to this extraordinary remedy in federal court upon the most minimal showings. Shockingly, the states' own citizens, as private defendants, would be in a better position to defeat preliminary injunction motions than state defendants.

The opinion also redefines the traditional notion of the Eleventh Amendment as a shield against excessive federal encroachment in state affairs. Instead, the opinion views

the Eleventh Amendment's constitutional protection as a sword to cut the states loose from their own respective institutional dispute settlement mechanisms. If this opinion stands, state governments will be required to defend their statutes in federal court either by acceding to the preliminary injunction or waiving their sovereign immunity. Traditional elements of equity jurisprudence and federalism guard against such stark choices and drastic results.

SUMMARY OF ARGUMENT

The opinion below overturns well-settled principles of equity jurisprudence and federalism. The opinion merges two separate and distinct elements necessary for preliminary injunctive relief against state officials in federal court, and removes the requirement of resorting to this extraordinary relief only to preserve the status quo. By holding that a federal court with equity jurisdiction may only consider the available federal remedies in determining whether adequate legal remedies exist, and that the absence of federal legal remedies causes irreparable harm *per se*, the opinion both imposes significant hardship on state officers enforcing state statutes and emasculates the efficacy of viable state law remedies. The opinion subjects state statutes to preliminary equitable relief on behalf of plaintiffs whose "irreparable injury" can be compensated or adjudicated through efficient state processes. To defeat a motion for preliminary injunction against its officials, the state is now faced with the untenable alternatives of waiving its sovereign immunity against monetary damages or acceding to the injunction against its challenged

statute. These choices subject states to preliminary relief which its own citizens, as defendants therein, would escape. The court's opinion thus removes the degree of protection the Eleventh Amendment has long afforded the states. More drastically, the court's opinion rewrites the Eleventh Amendment as an affirmative device to entrap the states within the jurisdictional ambit of the federal courts. The court's opinion, therefore, defies well-settled concepts of equity jurisprudence and federalism and must be reversed.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' HOLDING THAT FEDERAL COURTS, IN CONSIDERING THE PROPRIETY OF PRELIMINARY INJUNCTIVE RELIEF, NEED NOT EXAMINE ADEQUATE STATE LAW REMEDIES OVERTURNS LONG-STANDING PRINCIPLES OF EQUITY JURISPRUDENCE AND FEDERALISM.

Federal courts have long declined from exercising their extraordinary equitable powers and refused to enter preliminary injunctions against state officials enforcing state statutes unless the challenger can show both 1) the inadequacy of a legal remedy and 2) irreparable harm. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). A preliminary injunction should issue not to alter the situation, but rather to preserve the status quo. *University of Texas v. Camenisch*, 451 U.S. 390 (1981). "[T]he court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement

may be burdensome to the plaintiff." *Yakus v. United States*, 321 U.S. 414, 440 (1944).

The decision of the Second Circuit Court of Appeals in the present case effectively merges both separate and distinct elements for preliminary injunctive relief, and ignores their limited application. The court holds that if a legal remedy is unavailable in federal court, then irreparable harm is demonstrated *per se*.[1] (App. 5a). In federal court challenges to state officers enforcing state statutes, therefore, the Eleventh Amendment bar against monetary damages automatically warrants a finding of irreparable harm. This finding turns traditional notions of law and equity on their heads, removing the extraordinariness of federal injunctive intervention against state officials and statutes. A further anomaly is also created by the opinion: federal court preliminary injunctions will issue more frequently against state officials than against private defendants against whom monetary damages are available in that forum. The court's opinion, therefore, creates an unacceptable result. Instead of recognizing the Eleventh Amendment as a defense to limit states' exposure to actions for monetary relief in federal court, the opinion actually deploys the states' constitutional right of immunity from damages as a device to expand federal courts' equitable jurisdiction. That federal courts may grant prospective permanent injunctive relief against state officials (*Edelman v. Jordan*, 415 U.S. 651 (1974)) does not justify this radical extension to granting virtually automatic preliminary injunctive relief.[2] The opinion thus runs counter to

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[1] The record reflects that the United States neither moved for nor demonstrated irreparable harm. (App. 21a)

[2] Ironically, the U.S. government's position in this case, if upheld, may long return to haunt. As the Petition for Certiorari correctly points out, the court of appeals' opinion will subject the U.S. to an identical fate in challenges to its statutes. (Pet. at 15).

well-settled principles of federalism and previous decisions of this Court and other circuits.

This Court has long recognized that federal courts, in determining the appropriateness of preliminary injunctive relief, must consider the availability of all adequate legal remedies, state or federal. This Court need look no further than *Ex Parte Young*, 209 U.S. 123 (1907) for affirmation of this principle. In that case, this Court affirmed an injunction issued against a state official enforcing an allegedly unconstitutional state statute. Although the injunction was deemed proper, the Court did consider the adequacy of remedies at state law. The Court concluded that the state law remedy, a defense to a criminal prosecution, was too speculative, incomplete, and dilatory. *Id.* at 163-64.

This Court also affirmed the denial of an injunction against a state statute which did not cause irreparable injury in *Massachusetts State Grange v. Benton*, 272 U.S. 525 (1926). In that case, plaintiffs sought to enjoin a state statute as unconstitutional or pre-empted. Plaintiffs claimed that the statute jeopardized their claim to certain state aid and raised their labor costs. This Court rejected that argument, and declined to enter an injunction against enforcement of a state statute unless the case was "reasonably free from doubt and . . . [the injunction was] necessary to prevent great and irreparable injury." *Id.* at 527. This Court reasoned that the plaintiffs suffered minimal injury and emphasized the "very strict[ ]" rule that federal courts should refrain from enjoining state statutes which cause little harm. *Id.* at 528-29.

That federal courts, in considering preliminary injunctive relief, must consider the adequacy of state law remedies is also the teaching of *Matthews v. Rogers*, 284 U.S. 521 (1932). In that case, plaintiffs sought a federal

court injunction against the enforcement of an allegedly unconstitutional state tax statute.[3] A three-judge district court issued an injunction. This Court reversed. It reasoned that the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Id.* at 525. The Court held that a federal court injunction was inappropriate since "the remedy at [state] law is plain, adequate, and complete, [and] the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be present . . ." *Id.* at 526.

Similarly, in *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176 (1935) the Court considered the adequacy of state law remedies in rejecting a complaint for a federal court injunction. In that case, the district court exercised its equitable jurisdiction and appointed a receiver in a shareholder dispute. The court of appeals affirmed. This Court reversed. The Court held that federal equitable jurisdiction was exercised improperly since the state statute "afford[ed] a complete, comprehensive, and economical scheme . . ." *Id.* at 179. It reasoned that injunctive relief was inappropriate since adequate state law remedies existed and "the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers." *Id.* at 185.

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[3] Significantly, *Matthews v. Rogers* was decided before the enactment of the Tax Injunction Act, 28 U.S.C. §1341. The Court relied on prevailing concepts of equity jurisprudence. The Court of Appeals therefore erred in narrowly reading the scope of § 1341.

In other contexts this Court has also considered the availability of state laws in determining the propriety of injunctive relief. In procedural due process cases, for example, this Court has recognized the inappropriateness of federal injunctive relief against certain state action where common law remedies exist. *Ingraham v. Wright*, 430 U.S. 651 (1977); *Paul v. Davis*, 424 U.S. 693 (1976). *Cf. Parratt v. Taylor*, 451 U.S. 627 (1981).

The Second Circuit's reliance in this case on *DiGiovanni v. Camden Fire Ins. Assn.*, 296 U.S. 64 (1935) and *Petroleum Exploration, Inc. v. Commissioner*, 304 U.S. 209 (1938) for the proposition that federal courts may consider the availability of only federal remedies in determining the propriety of equitable relief is misplaced. Those cases involve attempts to bootstrap federal jurisdiction by asserting claims for equitable relief to overcome the jurisdictional defects in the legal claims.[4] This Court rejected those attempts and stated that for jurisdictional purposes a federal court cannot extend its powers beyond its constitutional and statutory authority.

This Court's statements in *DiGiovanni* and *Petroleum Exploration* that a federal court may only assert jurisdiction to grant remedies in those instances federal law specifies thus arose in different contexts than the question presently at bar. The case at bar involves the consideration a federal court which possesses jurisdiction must give to legal remedies existing in other forums. The proper

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[4] *DiGiovanni* involved an attempt to overcome the jurisdictional defect of failing to plead the requisite dollar amount for diversity jurisdiction. *Petroleum Exploration* recognized that although the federal court possessed equity jurisdiction, it properly declined to exercise such power since traditional injunctive standards were not met. Many of the concerns underlying the federal court's refusal to exercise equitable jurisdiction in *Petroleum Exploration* were codified in the Johnson Act, 28 U.S.C. §1342.

focus in this case, in other words, is not whether a federal court must examine federal remedies to determine if its jurisdictional prerequisites are met; rather, the inquiry concerns the remedies a federal court may consider "adequate" in determining the propriety of granting equitable relief. As explained *supra*, federal courts which possess jurisdiction nonetheless conduct this further deliberation regarding whether to exercise their discretion and acknowledge jurisdictional limits to their power. This deliberative process is essential not only to avoid needless interference with the authority of state officers or the adjudicative ability of state courts, but also to preserve traditional precepts of federal court equity jurisdiction.

In the present case, the district court possessed federal question jurisdiction and therefore the consideration of *DiGiovanni* and *Petroleum Exploration*, *i.e.* whether the court has jurisdiction to award the remedy, does not apply. The question the court of appeals failed to consider was whether injunctive relief was appropriate in a federal court possessing jurisdiction when adequate state law remedies existed. A similar case challenging an Illinois statute, for example, would state a cause of action for damages under the Illinois Court of Claims Act, Ill. Rev. Stat. 1981., ch. 37, §439.1 *et seq.*[5] State courts, moreover, can capably dispose of the substantive issues and provide declaratory and injunctive relief.

The implications of the Second Circuit's opinion can hardly be overstated. At stake is the vitality not only of state statutory schemes and state adjudicatory processes, but also aged and revered concepts of federalism and equity jurisdiction. 1 POMEROY'S EQUITY JURISPRUDENCE §293,

[5] Virtually all, if not every, state has some mechanism to adjudicate and award monetary claims against state officials.

at 654 (5th ed. 1941). The court's opinion erroneously overturns equity's traditional reluctance to grant relief when adequate alternative remedies exist. By finding that the lack of an adequate federal legal remedy establishes irreparable harm *per se*, the opinion also removes any threshold requirement of irreparability.[6] The granting of preliminary injunctive relief against state officials will become virtually automatic. The opinion, in effect, elevates the legal remedy to the extraordinary, and promotes equitable relief as common.

The court's opinion, finally, destroys any pretense of a federalist republic by emasculating the efficacy of efficient and complete state law remedies and processes. The opinion uses the Eleventh Amendment bar against monetary relief against state governments as a lever to expand federal court equity jurisdiction. The court of appeals' use of the Eleventh Amendment as a sword to increase its equity jurisdiction, however, impermissibly intrudes upon traditional notions of equity practice, prior teachings of this Court, and fundamental precepts of

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[6] The record in this case indicates that plaintiffs suffered only a *de minimus* injury. The challenged statute affected only approximately 1% of Beechcraft's business (App. 21a). This Court has recognized that " '[m]ere injuries, however substantial in terms of money, time and energy necessarily expended, . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.' " *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Other circuits also would not consider this damage irreparable, especially since monetary relief is available and viable. *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981); *Penn Central Company v. Buckley & Co.*, 415 F.2d 762, 763 (3rd Cir. 1969); *Tele-Controls, Inc. v. Ford Industries, Inc.*, 388 F.2d 48, 50 (7th Cir. 1967).

federalism. To defeat a preliminary injunction motion, states are now compelled either to waive their sovereign immunity or repeal the challenged statute.

CONCLUSION

For all the above reasons, the States of Illinois, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, as *amici curiae*, respectfully request this Court to grant this petition. This Court's guidance will correct the Second Circuit Court of Appeals' disruption of traditional federal court standards for entry of preliminary injunctive relief and assure proper deference to federalist concerns deep-rooted in our republic.

Respectfully submitted,

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